UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TITUS, LLC

and Case 5-CA-35081

JAMES DINKINS, AN INDIVIDUAL

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 26

and Case 5-CB-10607

JAMES DINKINS, AN INDIVIDUAL

M. Anastasia Hermosillo, Esq.,
and Paula S. Sawyer, Esq.,
for the General Counsel
Gary L. Leiber, Esq.,
of Washington, D.C.
for the Respondent Employer
Ellen O., Boardman, Esq.,
and Renee. M. Gerni, Esq.,
of Washington, D.C.
for the Respondent Union

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Washington, D.C. on January 20 to 22, 2010.[1] The charge in Case 5-CA-35081 and in 5-CB-10607 were each filed on June 29. The charge in Case 5-CA-35081 was filed against Titus, LLC (Titus or the Employer). The charge in Case 5-CB-10607 was filed against the International Brotherhood of Electrical Workers, Local 26 (Local 26 or the Union.) The charges were filed by James F. Dinkins. The consolidated complaint alleges that Local 26, by the terms of its collective-bargaining agreement by which Titus is bound operates an exclusive hiring hall. It is alleged that, pursuant to the provisions of its collective-bargaining agreement Local 26 referred Dinkins to employment with Titus on June 2, but then ordered Titus to terminate Dinkins employment on or about June 4, and that on or about June 5, Titus discharged Dinkins because he was a traveler, and not a member of Local 26. It is alleged that Local 26 violated Section 8(b)(1)(A) and (2) of the Act, and that Titus violated Section 8(a)(1) and (3) of the Act by the conduct set forth above. It is also alleged that Titus violated Section 8(a)(1) of the Act through its agent Tim

[1] All dates are 2009 unless otherwise specified.

Norris by implying Dinkins should not be employed by Titus because Dinkins was not a member of Local 26.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Local 26, and Titus, I make the following[3]

Findings of Fact

I. Jurisdiction

Titus, a corporation, with an office and place of business in Washington, D.C., has been engaged in installing industrial electrical systems and instrumentation. During the past 12 months, in conducting the described business operations, Titus has purchased and received at its Washington, D.C. facility goods valued in excess of $50,000, directly from points located outside the District of Columbia. The Respondents admit and I find Titus is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 26 is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondents admit that Titus President Otis Miller and General Foreman Tim Norris are supervisors and agents of Titus. Respondents admit that Larry Greenhill is the vice president of Local 26, and that Frank Laddbush was a referral agent for Local 26, and that both are statutory agents of Local 26. Local 26 also admits that George Hogan is a referral agent for Local 26, and a statutory agent of Local 26.[4] Miller, Norris, Laddbush, and Hogan gave testimony during the course of this proceeding. Respondents admit that Titus was a member of a multi-employer association, which on behalf of its employer-members has entered into a series of collective-bargaining agreements with Local 26, the most recent of which was effective from June 1, 2009 to May 31, 2012, and the predecessor agreement was effective from June 1, 2008 to May 31, 2009. Respondents admit the applicable collective-bargaining agreements contain a hiring procedure which states Local 26 shall be the sole and exclusive source of referral of applicants for employment. Respondents also admit that Titus has a Section 8(f) of the Act collective-bargaining relationship with Local 26. Miller, Norris, and Laddbush testified that Titus must hire its electricians through Local 26, and I find, per their testimony, and the terms of the collective-bargaining agreement that Local 26 operates an exclusive hiring hall.

James Dinkins, a journeyman electrician, began working as an electrician in 1980. Dinkins has been a member of IBEW Local 776 out of Charleston, South Carolina since 1998.

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[2] Counsel for the General Counsel's unopposed "Motion to Correct Errors in Transcript" contained in its post-hearing brief is granted.

[3] In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth herein.

[4] Local 26 denied that shop steward Lynward Sherman was its statutory agent for purposes of the allegations raised in the consolidated complaint and it denied that Bill Giusti and Randolph Scott were its statutory agents for the time periods material to the complaint. Only Sherman's status as an agent appears to relate to the issues litigated before me, and his status was briefed by the General Counsel and the Union.

Dinkins moved to Maryland in 1999 after which he began to use Local 26's hiring hall to obtain work. Dinkins is not a member of Local 26. He testified that in order to use Local 26's hiring hall he has to register there and present a current Local 776 dues receipt. Dinkins testified he originally registered with Local 26 for the use of its hiring hall in January 2000. Dinkins obtained Group 1 status, (also referred to as Book 1), the highest referral status, within Local 26 in 2003. Dinkins attempted to become a member of Local 26, on three occasions, the last of which was in 2004. However, Dinkins' applications for membership were declined.

Local 26 referral records show Dinkins was first referred for employment by Local 26 on January 24, 2000. The records show his first and second referrals in 2009 were on May 7 and June 1, to Newtron, Inc. (Newtron) and he was rejected by Newtron on both occasions. Dinkins testified that since he began using Local 26's hiring hall there has been a decline in the number of job postings from what there was years ago. He testified that, at one time, the hall had around 20 to 40 calls a day, but currently there were very few calls, estimating there might not even be two or three a week. Prior to the May and June referrals to Newtron, Local 26 records show Dinkins had last been referred to Freestate on June 9, 2008, and that he was terminated there due to a reduction in force on October 17, 2008.

Dinkins began contacting Titus Foreman Tim Norris in April 2009, requesting employment with Titus. Dinkins testified Norris told him they would be looking for more men soon and he would place Dinkins first on his list for additional help. Norris, a member of Local 26, worked with Dinkins on prior jobs.

Dinkins credited testimony reveals the following:[5] On May 5, Dinkins went to the Local 26 hiring hall to sign the daybook to apply for a job. On May 5, Dinkins accepted a job referral from the hall for Newtron for which he was supposed to report on May 7. Dinkins reported to the job on May 7, and Shop Steward Linwood Sherman told Dinkins he had been rejected by Newtron. Dinkins' testimony reveals Sherman knew Dinkins from their working on prior jobs and Sherman knew Dinkins was a traveler because when they worked on the Gaylord project Sherman was the steward requiring him to collect dues receipts showing Dinkins was a member of Local 776.

Dinkins testified that, during a conversation on May 28, with Referral Agent Frank Laddbush at the union hall, Laddbush asked Dinkins why he was accepting another referral to Newtron on that date when Dinkins knew they were going to reject him. Dinkins replied he did not know that. Laddbush stated Dinkins was just going to be standing in the way of another guy getting a job. Dinkins told Laddbush that he could not refuse work because he was receiving unemployment. Laddbush told Hogan that they would not argue with Dinkins and to give him the referral. Dinkins testified he did not know for certain Newtron would reject him, so he took a chance of going back hoping to obtain employment.

Dinkins' credited testimony reveals: On May 28 he received a phone call from Titus President Otis Miller. Miller told Dinkins that Norris had recommended Dinkins for hire with Titus, stating Norris had stated Dinkins was a good man looking for a job. Miller asked if Dinkins wanted to work for his company, and Dinkins said yes. Miller said he would put in a referral for Dinkins at the union hall, that he wanted Dinkins to start that Monday, June 1. Dinkins told Miller that he had already received a job referral from the hall for Newtron, but he

[5] I found Dinkins to be a credible witness based on his demeanor and the content of his testimony and have credited his testimony as described in this decision. Dinkins relayed his version of events in a consistent fashion, with good recall, and he withstood rigorous cross-examination.

did not know if he would get the job because he had been denied employment at Newtron on a prior occasion. Dinkins told Miller the job referral required him to show up on Monday, June 1 at Newtron. Miller told Dinkins to wait until June 1, see what happens, and to give him a call if Dinkins did not get the job.

Dinkins reported to the Newtron jobsite on June 1, prior to 7 a.m., and Dinkins asked Sherman if Newtron was going to take him this time. Sherman said no, they had denied Dinkins again. Dinkins asked Sherman for an explanation, and Sherman said he did not know the reason. Dinkins told Sherman that Sherman knew Dinkins was a traveler. Dinkins said he tried to get in Local 26 several times but they would not accept him. Sherman said they were not going to accept him as a member of Local 26. Sherman said they do not accept anyone. Dinkins then left the site. Dinkins testified that, after he left the Newtron site on June 1, he called Miller and told him that Dinkins was denied employment at Newtron. Miller said he would put in a referral request for Dinkins at the union hall that day. The fax request for Dinkins to the hall from Titus shows it was made, as per the time stamp of Titus fax machine on June 1, at 2:58 p.m. It requested Dinkins for referral by name, with an approximate duration for the work listed on the request as 6 months.

Dinkins went to the Local 26 hall, between 7:30 and 8:30 a.m. on June 2, to obtain the referral slip to Titus. Dinkins testified Local 26 referral agents Laddbush and Hogan were behind the referral window when he arrived and they could both hear what was said. Dinkins told Laddbush that he came to pick up a referral from Titus. Dinkins did not have his Local 776 dues receipt for June with him, a requirement for him to be referred. However, he had requested Local 776 to email the receipt to Laddbush. Dinkins told Laddbush Local 776 had emailed it to Laddbush, but Laddbush said he never received it. Dinkins called Local 776 and asked them to email it to Local 26 again, but Laddbush continued to deny its receipt. Dinkins testified this went on for a couple of hours. As a result, Dinkins called Local 776 and had them email the receipt to Dinkins home computer, and he had his wife fax the receipt to Local 26. Dinkins testified he went to lunch around noon because the Local 26 officials kept telling him they did not have the receipt. Dinkins returned from lunch around 1 p.m. and Hogan told Dinkins that Hogan had the dues receipt. Dinkins testified he received a referral after 1 p.m., and that he headed to Miller's shop at Titus, around 2 p.m. Dinkins filled out his employee paper work at Titus on June 2. Dinkins received a call from Miller later that day. Miller told Dinkins that he was not going to be able to start work on June 3 because they did not receive his paperwork in time to get on the job site and go through the security process.

Dinkins reported to Norris at the Titus Springfield, Virginia NCE job on June 4. Dinkins testified that he worked for Titus on June 4 on temporary lighting, pulling wire and installing high bay temporary lights inside one of the tower buildings on the eighth floor. Dinkins testified the temporary lighting was used throughout the building for different crafts and trades. Dinkins left work that day around 2:30 p.m. which was the time they knocked off from work.

Dinkins testified that, after leaving work on June 4, he received a phone call from Norris as Dinkins was driving home. Dinkins estimated he received the call around 2:40 p.m. Dinkins credibly testified as follows:

> Mr. Norris called and he said, Hey man, I didn't know you wasn't local 26. And I said I'm not. I said I wasn't. He asked me why I didn't I tell him that I wasn't local 26, and I told him he didn't ask. He said, Look; he said, there's something you have to understand. There's a lot of -- he said, I have a lot of guys from Local 26 that are looking for work. He said, the hall is calling me, asking me why did I hire you, knowing that you weren't Local 26. And he said there's a whole lot of people that's coming down on him.

> And he said that it is personal. I don't believe in giving another guy a job from another local when we got -- when I got guys that's on the book.
>
> And I said, Tim, I signed Book 1 just like you. And he said -- I told him I signed Book 1 just like him, and I told him that I had to go in and in this through the hiring hall --no, no. Yeah, I told him, I said, I had to go through the hiring hall to get this job, and it doesn't make sense that the hall is calling you now, since they gave me the referral. He said that he didn't know anything about that. He said, I just can't have you working. And he said, Something's got to be done about it. I told him, I said, Tim, I am eligible for the job. I said, the hall sent me here. And not only that, I said, you referred me to this job. And he said, Do you understand, basically, I have a lot of people. I mean, dang, there is pressure on me right now. You know, people ain't with it. And he said, Do I understand how you feel about it? And I said, Well, Tim, I signed Book 1 just like you. He said, I got a headache, and we'll just talk about it tomorrow.

Dinkins testified he tried calling Norris several times that evening, but Norris would not take the calls. Dinkins testified he left Norris a message that they were friends, that they knew each other, and that they could talk about this like men. Dinkins testified he was on the way to work on June 5, at around 5 a.m. when he received a call from Norris. Norris told Dinkins to meet him in the parking lot before Dinkins went to work.[6] Dinkins testified he met Norris around 5:20 a.m. that morning in the parking lot. Dinkins went up to Norris' truck and Norris gave Dinkins a pink slip and a check. Norris told Dinkins that he had to understand, that he knew how it is and what was going on. Dinkins told Norris he did not think what he was doing was fair, that Dinkins was Book 1, that he deserved and needed the job, and he was going to have to take it to the Labor Department. Dinkins' termination slip was signed by Miller stating he was eligible for rehire. It stated Dinkins' was being laid off as a result of a reduction in force.[7] Dinkins testified he called Miller on the morning of June 5, and several days thereafter, following Dinkins' termination from Titus. However, Miller would not take or respond to Dinkins' calls. Dinkins testified he called Miller from Dinkins' home phone. However, Dinkins' cell phone records reflect that Dinkins also placed two calls on June 5 to Miller on Dinkins' cell phone.

Counsel for Local 26, offered a stipulation at the hearing that there was a non-board settlement, dated August 24, 2009, executed by Dinkins, Local 26, and Newtron for Cases 5-CA-35132 and 5-CB-10606, and by its terms, the execution of the settlement would not be construed as an admission of fault or liability by any party or an admission of any contention or obligation made by any party, nor shall it have any precedential effect on any dispute between or among the parties. Pursuant to that settlement the referenced cases were withdrawn and the withdrawal was approved by the Regional Director of Region 5. Counsel for the General Counsel concurred with Local 26's proffer concerning the non-Board settlement agreement.

Dinkins credibly testified that: Dinkins was hired by Newtron at the end of August 2009, and Dinkins reported to work on Wednesday, September 2 for Newtron. Following a safety briefing by the foreman, Dinkins reported to Shop Steward Sherman, who drove Dinkins to the badging office. On route to the office, Sherman told Dinkins that he had two strikes against him in that Dinkins did not report to work on Monday and he was 15 minutes late on Tuesday. Dinkins did not deny the attendance indiscretions but protested the warnings. Dinkins testified

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[6] Dinkins' phone records serve to corroborate his chronology of his phone calls with Norris on June 4 and 5. The phone records show Dinkins received an 11 minute call from Norris at 2:42 p.m. on June 4, and that Dinkins placed calls to Norris at 7:10, 7:15., 7:19, and 8:30 p.m. on June 4 of short duration. Dinkins received a call from Norris at 5:01 a.m. on June 5.

[7] Dinkins testified he did not work on June 3, as reflected on the termination slip. He testified he worked on June 4, and he received the slip on June 5.

Sherman gave him something in writing which he called "two verbally written warnings," and Sherman said he would bring the paperwork later on that day for Dinkins to sign, meaning one more and Dinkins was terminated. Dinkins asked if there was anything he could do to erase the strikes, and if after a month or so if they could be removed from his record. Sherman stated there was nothing he could do to erase them. Sherman then said one more thing, "You know, you know you're a traveler, and when there is a layoff, you're going to be the first to go." Sherman said, "I want to make that clear that you understand that." Dinkins testified that he did not know who Sherman was speaking for, "but him being the steward gave him authority to speak for somebody."

Dinkins testified Sherman worked as a journeyman on the job Newtron, but he was not always working. Dinkins testified Sherman escorted employees who were terminated to their cars in the parking lot. Dinkins testified when he received warnings Sherman gave them to him, and when he was laid off or terminated Sherman told him. Dinkins testified he never saw Sherman give anyone work instructions, and the foreman gave employees their job assignments. However, Dinkins was told Sherman was handling the assignment of overtime on a Saturday project. Dinkins testified when he was terminated at Newtron, Sherman attended Dinkins' meeting with management. He testified Sherman was the only steward at the meeting.

A. Titus' witnesses

Miller is the president, co-owner, and senior project manager of Titus. Miller testified Titus is signatory to the collective-bargaining agreement with Local 26 and he has to put in a manpower request to Local 26 any time he needs electricians. He testified Titus' hiring practice involves sending a fax referral request to Local 26. Miller testified he can request an electrician by name to Local 26 and he does so when he is aware of an individual's capabilities. Miller testified he discusses manpower needs with his foreman for a particular job, and the foreman is also referred to him by Local 26.

Miller testified Titus received a contract to perform work for Truland Systems Corporation (Truland) in February 2009, to provide temporary lighting and power to two office towers on the NCE campus in Springfield, Virginia. Miller testified Titus began working on the NCE job around February 16, and there was no estimated end date for the work at the time of the trial in January 2010, although the contract with Truland estimated a November 2010 completion date.

Miller testified Norris was the Titus foreman at the NCE site. Norris recommended Dinkins be hired to Miller. Miller testified Dinkins was hired to connect temporary power for other subcontractors on the NCE site, as opposed to working on the two office towers for Truland. Miller testified Enclosure was the only subcontractor with which he had engaged in discussions for this additional work. Miller testified the conversations with Enclosure took place around the end of May. Miller could not recall the name of the individual from Enclosure with whom Miller had the conversations. He testified Enclosure contacted Miller by phone for Titus to connect Enclosure's subcontractor trailer for temporary power at the NCE site. Miller testified he had two conversations with the person from Enclosure. The work involved connecting one trailer to temporary power, and such work varies depending on the location of the trailer, and degree of difficulty in running the power to the trailer. Miller testified that, concerning Enclosure's trailer, the work could have taken a month. Miller testified he was receiving information about the work for Enclosure from Norris and from Enclosure's representative. Miller testified he never signed a contract or exchanged written proposals with Enclosure for the work. Rather, Miller verbally gave the Enclosure representative the amount Titus would charge for the work. Miller estimated the project was going to require two or three journeyman electricians, with a start date around the first week of June. Miller quoted a price to Enclosure

which included two or three journeymen electricians working for about a month. Miller testified he found out that Titus was not going to do this work towards the close of business on around June 4 when the people from Enclosure failed to call Miller back. Miller testified when he gave the Enclosure representative the price on the phone, Miller told him the scope of the work. He testified the man from Enclosure said the price was too high that it was not that much work, and the work would only take a week or two. Miller testified the Enclosure representative said he would call back within the hour, which was around noon, but he never called back. Miller testified Norris gave Miller a different evaluation of the work for Enclosure than that provided by Enclosure. Miller testified, based on Norris representation that Miller estimated the work would take a month or two. Miller testified Norris told him the Enclosure trailer was not close to the power source and some trenching was required to hook up the trailer.

Norris, in his testimony, gave a much different account of his estimate for the work required by Enclosure than Miller. Miller's claim that Norris told him the work for Enclosure would take a month or two, and would require two or three journeyman electricians, was undercut by Norris' testimony that the work for Enclosure could be accomplished in one week by Dinkins with the assistance of only one apprentice. Norris testified Dinkins was going to be the journeyman working on supplying power to the Enclosure's trailer, and the apprentice was already on Titus staff at the time, but had not been selected yet. Thus, Miller's testimony here was vague in that he could not recall the name of the alleged Enclosure official with whom he had contacted. He testified the conversations took place at the end of May, but then claimed there was a conversation on June 4, the only day Dinkins worked. Miller's testimony was also contradicted by Norris. Moreover, Miller admitted it was unusual for him to hire an employee for work which he had not yet secured.

Miller testified he phoned Dinkins on May 28, and told Dinkins that Norris recommended him for a job. During the call, Dinkins told Miller he had a referral to another job, but that he thought he was going to be rejected for the job. Dinkins called Miller around June 1, and he told Miller he did not get the job. Miller told Dinkins that Miller would put in a request for Dinkins to work for Titus with Local 26. Miller faxed in a "Request for Manpower" for Dinkins to Local 26 on June 1, naming Norris as the foreman on the job, and providing Norris' phone number. The request stated Dinkins was supposed to report at 6 a.m. to the shop, with 6 months listed as the approximate duration of the assignment. Dinkins received a referral from Local 26 stating he was to report to Titus at the shop at 6 a.m. on June 2. The referral listed Dinkins as a member of Local 776.

Miller testified Dinkins began working for Titus on June 4. Dinkins separated from employment from Titus on June 5. Miller testified Dinkins was let go because the anticipated work of supplying temporary power to subcontractors, in particular Enclosure, did not materialize. Miller testified Dinkins termination slip was created on June 4, and it was presented to him on June 5, the date he was laid off. Miller testified he had no problem with Dinkins' work performance or bringing him back if he was entitled to be referred. Miller testified he never had a conversation with anyone from Local 26 or Norris about not hiring Dinkins or travelers, nor was he aware that Norris had such a conversation with Local 26.

Miller testified he completes Local 26's manpower request form on a form Miller stored in Titus' computer system, which mimics the Union's manpower request form. Miller testified the fields available in Titus' system for proximate duration on the form in which an employee will be needed on a job are: 2 weeks, 3 weeks, 1 month, 6 months, and 1 year. Miller testified he has not viewed the proximate duration as an important field. Rather, it is just something to be filled in. He testified he does attempt to be accurate when filling in the estimated time period. Miller testified when he hired Dinkins he was going to have him assigned as part of a team of

employees working on subcontractors' trailers including that of Enclosure. While Miller initially testified he did not attempt to be accurate when filling the estimated duration an employee was expected to work, Miller then testified when he hired Dinkins that Miller thought Dinkins was going to be there for 6 months in that he thought Dinkins would do work on Enclosure's trailer and that of additional subcontractors trailers. Miller testified he thought that when Dinkins was not doing subcontractor work it would be possible to roll Dinkins over into something else instead of sending him home because the work loads varied based on the status of the work of other trades. Miller testified the plan was for Dinkins to be part of a team of between two to four electricians the size of which would vary based on the amount of work they obtained from the subcontractors. Miller testified the team of electricians would come from his current staff and/or new hires. Miller testified he had enough people on his current staff to shift one or two over to the potential subcontractor work. However, unlike Dinkins, those employees did not get laid off when Titus did not get the projected work. Miller testified he decided not to bid on other subcontractor work based on the difficulty he had with Enclosure.

I do not find Miller's explanations to be credible. Miller's testimony as to the projected length of the work for Enclosure and the staffing requirements for that work was undercut by the testimony of Norris, although Miller claimed he based his estimates on Norris' input. Moreover, while Miller testified it was not his practice to hire electricians for work he had not secured, he admittedly hired Dinkins for work he had not secured, based on conversations with an individual from Enclosure he could not name. Moreover, Miller listed that he would need Dinkins for 6 months on the Union's manpower request form. He then testified that Titus' input on the requested duration on those forms was not accurate, but then went on to state the 6 month estimate for Dinkins was accurate at the time Miller made it. In other words, Miller's testimony exhibited an air that he was making it up as he went along.

Miller testified that after Titus laid off Dinkins, Titus hired other electricians for the NCE site, but did not call Dinkins back to work. Titus accepted the referral of apprentice Brenda Sprester whose referral sheet to Titus is dated June 5. Miller testified the June 5 date on the document does not mean it was the date she started working for Titus. Miller testified it meant she took the call that day and she could have reported to Miller's office the next day.[8] Norris testified Sprester was assigned to the NCE site where she helped journeyman with wiring, hanging fixtures and putting in receptacles. He testified Sprester was pulling wire. Norris testified Sprester did not cut pipe at the site, although she had the ability to do so. In a position statement to Region 5, dated July 17, Titus represented that Sprester was hired June 9, and that journeyman electricians Pegues and Pye, were hired respectively at the NCE site on June

[8] Miller identified Titus' Manpower request for an apprentice dated March 9, with a requested start date of March 11, with an approximate duration of 1 year. However, Miller testified the request for an apprentice was not filled until June 5, when Sprester was referred. Miller did not know why the request for an apprentice was filled on the day Dinkins was laid off. He testified it sometimes takes weeks, if not months, for a request for an apprentice to be honored. Miller testified that Titus employment of Sprester did not have anything to do with Dinkins leaving. Miller testified he uses apprentices to keep costs down and they generally perform work they do not need a journeyman to do. He testified a third year apprentice makes around $17-$18 an hour and a journeyman makes $36 an hour. Miller testified that he had a conversation with Rhett Roe about referring Sprester. He testified Roe called Miller and asked if he still needed an apprentice because Miller's request for one was a couple of months back. Miller stated he did need an apprentice. Miller testified Roe was the only person with whom he discussed Sprester's assignment with Titus, and the conversation occurred around the first week of June.

29, and July 10.[9] Dinkins filed the unfair labor practice charge against Titus on June 26, and Region 5 mailed it to Titus on June 29.

Miller testified he is aware that one of his foremen, Dean Pink, was from Connecticut and would be labeled as a traveler. Miller testified Pink still works for him as a general foreman at a couple of jobs. Miller testified Robert Williams is employed by Titus as a journeyman at the NCE project. Miller testified did not know what local Williams is a member of, but Miller thought Williams was part of Local 26 because Local 26 referred Williams to Titus. Miller testified Williams is still working for Titus at the NCE site. During his testimony, Miller reviewed Williams' referral slip from Local 26, showing Williams is a member of local 1340. However, Titus' payroll records on Williams reflect that he is a member of Local 26. Miller testified he created the form for employees to fill out, and it is stored in Titus computer system. He testified they assume everyone is a member of Local 26 on the form, since they are referred by Local 26, so the computer program automatically designates Local 26 as their local. Miller testified he had no reason to know what local Williams was a member of, and that he only found out Williams was not a member of Local 26 during the course of the unfair labor practice trial.

Titus Foreman Norris was employed at Titus at the time of his testimony having worked there since February 2009. Norris has been a member of Local 26 for nine years. As a foreman, Norris does not do hands on work. He testified there were 13 electricians on the site at the time of the January 2010 trial. Norris testified he can layoff employees but he would discuss it with Miller first. He testified the rule of thumb for layoff is usually the last one on is the first to go.

Norris testified he had worked with Dinkins in the past, and Norris recommended Dinkins for hire to Miller around the end of May. He testified he did not tell Miller how long he thought Dinkins should be on the job. Norris testified Dinkins worked one day for Titus performing work with Titus' other electricians in one of the main office buildings installing lights. Norris testified he had a rush on a particular project at the building and he estimated he had five journeymen working on the floor Dinkins worked. Norris testified the project was completed at the end of that day.

Norris testified they learned they were not going to do the work for Enclosure around June 4. Norris testified Miller told him they were not going to do the work during a phone call at work. Norris testified he and Miller spoke back and forth and at the end of that day Norris called Miller and told him they would not need Dinkins. He testified he told Miller that Norris was talking to the superintendents on the job and, noting that they did not get the work for Enclosure, Norris could not use Dinkins in the building anymore. Norris testified he went to the Titus shop in Washington, D.C. after work on June 4, and spoke to Miller in person there. Norris testified he left the job site around 4 or 5 p.m., and estimated that he arrived at the shop at 5 p.m. Norris

[9] Miller testified that Peques and Pye were requested by name to the Union for referral to Titus. Miller testified he made the request to the Union for Peques based on Norris' recommendation and the increase in workload to meet some of the scheduling demands of the general contractor. Miller testified the general contractor was accelerating and working on weekends. Respondent's records reveal that journeyman Clark's employment ended on July 1, and journeyman Skeeter's employment ended on July 8. Miller testified that he has requested the same individual more than once at other projects, and that is it is a fairly typical practice for him. Miller testified he normally he will call someone back when they have worked on a project and are familiar with the site. Miller testified he did not recall Dinkins because he was clearly out of sight and out of mind. Miller testified he did not give the idea of recalling Dinkins a second thought.

testified he talked to Miller about the situation concerning Dinkins on the phone, and Miller told Norris to come to the shop so they talked about it further. Norris testified he did not talk to anyone else about Dinkins' status besides Miller and Dinkins.

Norris testified he called Dinkins on the evening of June 4, after Norris knew Dinkins was going to be laid off. Norris gave a stammering response when he initially tried to explain his phone call to Dinkins testifying, "I called him that day, at the end of the day, to tell him that for the most part, we -- I called him at the end of the day to tell him that -- I called him at the end of the day there to tell them that I needed to talk to him." Norris initially testified the only thing he said to Dinkins was that he needed to talk to him. He estimated the conversation was a few minutes. Norris testified Dinkins asked what he wanted to talk about, and Norris did not say anything in response, just that he needed to talk to Dinkins. Norris testified he set up a time to talk to Dinkins the next morning on the jobsite. In later describing the June 4 call to Dinkins, Norris testified he said, "I just needed to talk with him that next morning there." Norris denied telling Dinkins that he was going to be laid off. However, Norris testified that, during the call, Dinkins said he was a traveler and he was going to get laid off. Norris testified, "I said, well, I just need to talk with you tomorrow morning. And he just babbled on about getting laid off, he was a traveler and--." Norris testified Dinkins was upset. Norris testified the only thing he said was that he needed to talk to Dinkins, and that Norris had no idea why Dinkins assumed he was going to be laid off. Norris testified there was nothing that he said that would suggest to Dinkins that he was going to be laid off. Norris testified, "That's all I said. That I just needed to talk with him." Norris later testified he told Dinkins to meet him in the parking lot and not to come on to the job during the call. Norris testified if Dinkins was not being laid off Dinkins would have come directly onto the job, rather than meeting Norris in the parking lot. Norris testified his telling Dinkins to meet him in the parking lot probably gave him an indication he was being laid off. Norris testified in response to a leading question that when Norris told Dinkins to meet him in the parking lot that Dinkins said he was a traveler and Dinkins said Norris was laying him off. Norris testified his conversation Dinkins on June 4 was about 5 minutes. Norris testified he called Dinkins after talking with Miller at the office.

Norris testified Dinkins said a lot during the June 4 call and that Dinkins said Norris was laying him off because Dinkins was a traveler, and "He was babbling about things." Norris testified, Dinkins was "Just babbling on and, you know, you are laying me off, you know, because I'm a traveler, just babbling." Norris testified Dinkins for the most part repeated you are laying me off because I am a traveler for about 5 or 6 minutes. Norris testified he did not respond to him and he just told him he needed to talk to him in the morning. Norris could not explain why he did not tell Dinkins the reason he was being laid off during the call.

As set forth above, I have credited Dinkins version of the June 4 call with Norris over that provided by Norris. Dinkins' phone records demonstrate that Norris called him and engaged him in an 11 minute phone call at 2:42 p.m. Dinkins testified in credible fashion to the conversation with good recall. He testified Norris told Dinkins that Norris did not know Dinkins was not a Local 26 member and there were a lot of men from Local 26 looking for work. Norris stated the hall is calling Norris asking why Norris hired Dinkins. Norris stated there were a lot of people coming down on him, and that it was also personnel in that Norris did not believe in giving someone a job from another local when he had guys on the book. Dinkins protested that he was Book 1, that he went through Local 26's hiring hall, and that it did not make sense that the hall was calling Norris. Norris responded he did not know anything about it, and that he just could not have Dinkins working. Norris told him there was pressure on him and that "people ain't with it." On the other hand, Norris had very little recollection of the call and his version of it did not make sense. When he was first asked about it, he gave a stammering response as if he was trying to avoid answering the question. He testified the call was made after 5 p.m. following

a face to face meeting with Miller. However, Dinkins' phone records show the call was made at 2:42 p.m. Norris initially testified all he told Dinkins was that Norris had to talk to him, and from that Dinkins automatically assumed Norris was laying Dinkins off because Dinkins was a traveler. According to Norris' version Dinkins must have been clairvoyant because Norris fully intended to lay Dinkins off. Yet, Norris gave no credible explanation of why he did not tell Dinkins that he was going to lay him off during the 11 minute phone call, or why he did not explain the reason for the layoff to Dinkins in the face of Dinkins alleged accusations. Norris could only belatedly state in explanation as to why Dinkins assumed he was being laid off that he told Dinkins to meet him in the parking lot the next morning. However, even this assertion is undercut by Dinkins phone records, because those phone records demonstrate that Norris called Dinkins at 5:01 a.m. on June 5. Dinkins testified during the call Norris told him to meet Norris in the parking lot that morning before Dinkins reported to work. Norris would have had no reason to place the call on June 5, if Norris had already given Dinkins that information on June 4, as Norris claimed. Norris June 4 call to Dinkins lasted 11 minutes. Yet, Norris claimed he had very little recollection of what was said, and he tried to explain this by stating Dinkins was just "babbling on." However, Dinkins, also an electrician, testified he did not even know what the word babbling means. I do not find it is likely that the term was commonly used by these employees, and it was likely a term Norris heard in pre-trial regarding why Norris allegedly could not recall the specifics of what was said. Regardless, considering his demeanor as well as the content of his testimony, I do not find Norris' testimony worthy of belief and I have credited Dinkins in full as to what transpired during his June 4 call with Norris.

Norris testified Dinkins was laid off on June 5, when Norris spoke to Dinkins in the parking lot at the jobsite. Norris testified he was at his vehicle at the time he gave Dinkins the layoff slip. Norris testified, "I didn't say anything to him. I just handed him his check there." When asked if Dinkins said anything when Norris handed him the layoff slip, Norris testified, "Yeah, he was babbling on about different things there." Norris testified, "He babbled on about being a traveler and this and that and that and that and how I was laying him off because he was a traveler." Norris testified he did not say anything in response to Dinkins accusation because Dinkins was "cussing and fussing," so Norris just gave him the layoff slip. Norris testified when Dinkins said he was a traveler this was the first time Norris had heard that. He testified he never spoke to anyone from Local 26 about employing travelers or about Dinkins. Norris testified that he did not know Dinkins was a traveler at the time he recommended him for hire with Titus.[10] Norris denied laying Dinkins off because he was a traveler.

Asset forth above, I did not find Norris to be a credible witness. He was employed by Titus and he testified in the presence of Miller, the owner of the company. Norris' testimony was vague, marked by poor recall and his story often times did not make sense. Accordingly, I have credited Dinkins' account of what transpired on June 4 and 5, over that provided by Norris. Similarly, I do not credit Norris' claim that he did not discuss Dinkins' reaction to his layoff with Miller because Norris did not think it was necessary to tell Miller at the time. Dinkins' credited

[10] In a position statement to Region 5, dated August 20, 2009, Titus' counsel wrote:

> Those facts are as follows:
>
> 1. Mr. Dinkins was recommended for hire to the Company by jobsite foreman, Tim Norris, the same person whom the charging party alleged terminated him because he was not a member of Local 26. If that was the case, why would Norris recommend him for hire in the first place? In this respect, Norris knew Mr. Dinkins was a traveler before he recommended him.

Respondent's counsel stated at the hearing on January 20, 2010, that statement in the position statement was counsel's error, and that he stood by Norris' testimony at the hearing when Norris denied knowing Dinkins was a traveler before Titus hired him. (Tr. 214).

testimony reveals he strongly protested his impending layoff for which he had been given warning of by Norris during the June 4 call which Dinkins' phone records reveal took place at 2:42 p.m. Yet, Norris testified he was instructed by Miller to report to the shop in Washington, D.C. after work, and Norris arrived there at around 5 p.m. specifically to discuss Dinkins' layoff. It is highly unlikely that Norris would not have reported Dinkins reaction during the earlier phone call that day when he met with Miller that night. Moreover, the record reveals that although Miller had phoned Dinkins shortly before he was hired, both Norris and Miller refused to return Dinkins repeated calls following Dinkins' termination. Miller's failure to return those calls, in particular, is unexplained unless, as I have found, Norris reported the results of his June 4 and 5 conversations with Dinkins to Miller.

Norris testified he recommended hiring electrician Robert Williams to Miller. Norris had worked with Williams in the past and Norris testified he knew Williams was not a member of Local 26, when Norris recommended Williams for hire. Norris denied having a conversation with Williams as to why Dinkins was laid off or that he told Williams that he got rid of Dinkins because Dinkins is a member of Local 776.

Williams was called to testify by Titus and was employed by Titus at the time of his testimony. Williams had worked there since April 2009 as a journeyman electrician. Williams testified he is a member of Local 1340 out of Newport News. Williams testified he knows Dinkins and Norris. Williams testified Norris never told him why Dinkins was let go by Titus and that he never talked to Norris about Dinkins' termination. Williams denied telling Dinkins that Dinkins should not be terminated because he was with a different local union. Williams testified he talked to Dinkins around the day after Dinkins was terminated. When asked if it was a relatively long conversation, Williams replied, "I don't recall." Williams testified, "I don't recall the conversation, but I remember talking with him." Williams was told Dinkins phone records showed the conversation between Dinkins and Williams lasted 16 minutes on June 5. When asked if that's sounded right to Williams, Williams responded, "I wouldn't know." He testified Dinkins did most of the talking. When asked if he remembered what was said, Williams responded, "No, not particularly." When asked if he remembered the subject of what Dinkins was talking about, Williams testified, "It would have probably been about why he wasn't at work." Williams testified he asked Dinkins why he was not at work, and Dinkins said he was laid off. Williams testified Dinkins did not say why he was laid off. When asked if Dinkins was upset, Williams testified, "I don't recall." When asked if Dinkins was talking in a normal voice, Williams responded, "I guess?" Williams testified he remembered talking to Dinkins but did not remember what Dinkins said. He testified he did not remember one word of the conversation.

Williams testified he was on a highway driving home from work during his conversation with Dinkins and Williams was mostly listening while he was driving. Williams testified he knew Dinkins was let go because he was not at work. He testified he could not recall whether Dinkins said he was let go during the call, and that Dinkins did not say why he was let go. When asked what Williams told Dinkins, Williams responded, "Nothing that I remember." Williams testified he was mostly listening because he was driving, that he was "saying uh-huh, okay, yeah, okay." He testified that was the extent of what he said. Williams denied telling Dinkins that Norris said he got rid of Dinkins because he was a member of Local 776. Williams denied telling Dinkins his local number should not matter. He testified Norris never told Williams why Dinkins was terminated.

Dinkins was recalled to the stand following Williams' testimony. Upon questioning by Titus' counsel, Dinkins testified he heard Williams' testimony at the hearing and Williams was not telling the truth. Dinkins gave an affidavit dated July 1, 2009, in which he stated:

> There's another guy, Robert Williams, who is currently on the Titus job. He started on the Titus job about a month before me. He was the one who originally told me to call Tim to set me up with a job. He also isn't a Local 26 member. He is either Local 84 or 1340 but -- The day after I was let go, Robert called me to find out what happened. He said he thought I was just late to work, but when he talked to Tim, Tim said he got rid of me that morning because my local number is 776. Robert told him that my local number shouldn't matter. Robert didn't tell him that he isn't a local 26 member. Although I don't want Robert to lose his job, I don't think it is fair that he is working and I am not.

Dinkins stood by his testimony in the affidavit at the hearing. Dinkins' phone records show Dinkins called Williams at 2:35 p.m. on June 5, and they engaged in a 16 minute conversation. The phone records reveal that call was preceded by a call from Williams to Dinkins which lasted a minute. Dinkins testified that service may have dropped, regarding the one minute call since Williams was on his way home on the Beltway. Dinkins denied that Williams was just listening and that Williams did not say anything about the reason Norris terminated Dinkins. Dinkins testified he had known Williams for a long time and he considered Williams to be a friend because they worked on several jobs together. Dinkins testified he thought Williams was lying during his testimony to save his job. The following exchange occurred during questioning by Titus' counsel of Dinkins concerning Dinkins' conversation with Williams:

> Q. Mr. Williams said you were babbling. Is that an accurate description?
> A. I don't even know, sir, what babbling means.

I do not find Williams to be a credible witness for obvious reasons. Williams' testimony was so marked by the absence of recall that it was simply beyond belief. Considering his demeanor, and the content of his testimony, I have concluded the absence of recall was based on fear of loss of his employment, and loss of possible future referrals by the Union if he had come forward in a truthful fashion. Williams, who had a prior working relationship with Dinkins, admittedly, had a lengthy conversation with Dinkins shortly after Dinkins was laid off. In fact, Dinkins' phone records reveal the conversation took place the afternoon Dinkins was laid off. Dinkins only worked at the site for 1 day, and by Norris version of the conversations leading to Dinkins' layoff, Dinkins repeatedly accused Titus of laying him off because he was a traveler, or a non-member of Local 26. Similarly, Dinkins credited testimony reveals he was told by Norris that Dinkins was being laid off because he was not a member of Local 26. Thus, Williams' claim that Dinkins did not tell Williams the reason Dinkins was laid off during a 16 minute phone call was simply beyond belief. Moreover, Williams feigned absence of memory and/or interest in what Dinkins had to say was simply incredible. First, Williams was also not a member of Local 26, so Dinkins layoff for that reason would have been a matter of keen concern to Williams. Williams' testimony was similar to that of Norris, who also testified in front of Miller. Their testimony was marked by an absence of recall, and substantively did not make sense. Accordingly, considering their demeanor, I have credited Dinkins' testimony over both Norris and Williams.

B. Local 26 witnesses

Frank Laddbush has been a member of Local 26 for almost 44 years and he has been employed by the Local for almost 10 years. At the time of his testimony, Laddbush was employed as a business agent for Local 26, and he had been in charge of the Washington D.C. satellite office since June 2009. He testified prior to that he was a referral agent for Local 26 working at its Lanham, Maryland office. Laddbush worked at that location as a referral agent since it opened in June 2006 until June 2009. Laddbush testified that, at the time of the hearing, George Hogan worked at the Lanham office as a referral agent in that Hogan replaced

Laddbush there. Laddbush testified Local 26 operates a hiring hall out of the Lanham, Maryland office, but apprentices are not referred through the Lanham hall, rather they are referred through the Joint Apprenticeship and Training Committee (JATC), which is located on the first floor of the same building as the journeymen's Lanham, Maryland hiring hall. Laddbush testified there were two floors of the building and Local 26 is located on the second floor where the referrals for journeyman are made. Laddbush testified the JATC is separate and distinct from Local 26. He testified that when an employer seeks an apprentice they contact the JATC Assistant Director Rhett Roe. Laddbush testified requests for apprentices do not come to Local 26's office, and Local 26 does not assign or refer apprentices, nor does Local 26 receive notice when an apprentice is requested or terminated. He testified the records concerning apprentices are kept at the JATC office, which maintains a separate fax number for apprentice requests, than the fax number for journeyman requests which are sent to Local 26

Laddbush identified the Inside Wireman Agreement, effective June 1, 2006, to May 31, 2009, to which Titus is bound. He testified that pursuant to that agreement Local 26 is the sole and exclusive source of referral for applicants for employment to Titus. Laddbush identified the successor agreement with an effective date of June 1, 2009. Laddbush testified the most recent contract has not resulted in any changes to the referral procedure. Laddbush testified that, during the first week or two of June, both he and Hogan were doing referrals out of Local 26. Laddbush estimated that in May or June 2009 around 700 to 800 people were on Local 26's available for work list, meaning they were out of work. He testified, upon reviewing exhibits, that on May 28 they were 709 people on the list, which he testified is more than average. Laddbush testified from Dinkins' work record it looked like he was attempting to work through Local 26 since 2000. Laddbush testified he knew of Dinkins' traveler status since Laddbush began doing referrals for Local 26 which was in August of 2000. Laddbush testified Dinkins' work record reveals that on January 2, 2003, Dinkins obtained Book 1 status at the Local 26 hall, which is the most favorable referral status under the collective-bargaining agreement.

The parties stipulated that Local 26 referred Dinkins to Newtron on May 5 and 28, and that Newtron rejected Dinkins on May 7 and June 1, respectively, concerning those referrals. Upon reviewing his handwriting on the hiring hall records, Laddbush testified it was he who referred Dinkins to Newtron on May 5. Laddbush identified a list that Local 26 faxed to Newtron on May 5 identifying names of the people being referred that day. There were 10 names on the list of which only Dinkins was not a member of Local 26 as reflected on the Union's list. Laddbush testified the information showing Dinkins was a member of Local 776 would have been sent to the employer receiving the referral.[11]

Laddbush testified, concerning Dinkins' May 28 referral to Newtron, that Laddbush tried to discourage Dinkins from taking the referral because Dinkins had already been rejected once by Newtron, and there were other people waiting to go to work. Laddbush testified he has made like comments to members of Local 26 in similar circumstances. He testified that was all he said during the conversation. Laddbush testified he thought Dinkins stated he could not turn down the referral for fear of losing his unemployment benefits. Laddbush testified he gave Dinkins the referral and there were no unpleasant words or exchanges.[12]

[11] The record reveals two Local 26 members and Dinkins were rejected by Newtron for the May 5, referral.

[12] Laddbush testified the Union keeps computerized records of an individual's work histories as well as a hard copy on a work history card. He testified if an individual is rejected by an employer a notation is made in the computer. Laddbush testified an employer, under the contract, is not obligated to give a reason for rejecting someone. He testified the Union finds out if someone is rejected when they return to the union hall and say they are rejected.

Laddbush testified Local 26 received a fax request for manpower from Titus requesting Dinkins on June 1. Titus fax machine stamped that it was sent at 2:58 p.m. Laddbush testified he was there when Dinkins came to the hall to pick up the referral. He testified the only people at the Local 26 hall who knew of the referral were Laddbush, Hogan, and Leah Whittaker, the office secretary. Laddbush testified he did not tell Hogan, Whittaker, or anyone else at the hall about Dinkins' referral to Titus, but Hogan and Whittaker were present when the paperwork for the referral came through. Laddbush could not recall which of the three gave the referral to Dinkins. Hogan testified he was aware Dinkins was referred to Titus in early June. Hogan testified he spoke about the referral with Laddbush. He testified the conversation was probably Dinkins is going to Titus, and that was the whole conversation. Hogan testified he did not recall if he was waiting for a fax concerning Dinkins' dues payment regarding the referral. Hogan did not recall if he physically gave Dinkins the referral slip.

Dinkins had a clear and credible recollection of his discussions with the Local 26 referral agents both with respect to his referrals to Newtron and as to the one to Titus. With respect to the latter, he testified there was a dispute over Local 26 receipt of Dinkins' Local 776 dues payment, which delayed Dinkins referral to Titus for several hours causing Dinkins a delay in his start for working at Titus. Laddbush and Hogan's testimony was marked by spotty recall. Moreover, I do not credit Hogan's claim that he did not recall the delay in Dinkins referral to Titus. As a result, I have credited Dinkins' testimony as to his contacts at the union hall over that of Laddbush and Hogan to the extent there was any inconsistency between the witnesses' accounts. It should be noted that Miller, Norris, Laddbush, and Hogan denied any contact between representatives of Titus and Local 26 concerning Titus referral request for Dinkins outside of the referral request itself. While this relates to the ultimate credibility question in this case, for reasons set forth in the analysis section of this decision, I do not credit this testimony.

C Analysis

1. Legal principles

A union violates Section 8(b)(2) of the Act when it attempts to cause or causes an employer to fire or lay off employees for reasons other than their failure to pay dues and fees under a valid union-security clause, including attempts to have employers fire travelers because of their status as travelers. *Plumbers Local 392 (Oberle-Jorde Co.),* 273 NLRB 786, 793 (1984). In *Plumbers Local 392,* the respondent union and employer were parties to an exclusive hiring hall agreement. In that case, the union's business agent visited the construction site and told the employer's construction manager that 450 local members were out of work and asked the employer to lay off travelers and replace them with local members. The construction manager stated he could not afford to lay off anyone. During this time period, the union steward had conversations with the travelers working at the site and told them they should plan on making the next day their last, and that anyone who was asked to leave and refused to do so would be sanctioned by the hall, they would never work out of the local again, and the union would not be responsible for what happened if they showed up on the job. None of the six travelers appeared for work the following Monday, and after 3 days of unexcused absences they were terminated by the employer. The Board approved the judge's finding that the union violated Section 8(b)(1)(A) by the actions of the steward whose threats caused the travelers to leave their jobs. The judge found the steward to be an agent of the union, noting that his actions were in line with

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Laddbush testified there no difference in terms and conditions of employment for travelers and non travelers. Laddbush testified there are more Local 26 members in the preferred Book 1 referral category under the contract, and more travelers are in the Book 2 category.

the statement of the business agent.[13] The Board majority approved the judge's Section 8(b)(1)(A) finding with respect to the conduct of the union steward without finding it necessary to decide whether the steward's threats themselves were independently violative of Section 8(b)(1)(A). The Board found the union also violated Section 8(b)(2) of the Act by attempting to cause the employer to layoff the travelers.

In *M. W. Kellogg Constructors*, 273 NLRB 1049 (1984), remanded on other grounds 806 F.2d 1435 (9th Cir. 1986), the Board affirmed the judge's findings that the respondent employer violated Section 8(a)(1) and (3) of the Act by refusing to assign overtime to travelers and by laying off 87 travelers because of their non-membership in the respondent union. The Board reversed the judge by also finding the respondent employer violated Section 8(a)(1) and (3) of the Act by laying off an additional 42 named travelers. The Board stated that:

> Applying the *Wright Line* analysis, the judge properly found that the General Counsel made a prima facie showing that nonmembership in Respondent Union was a motivating factor in Respondent Employer's decision to deny unscheduled overtime to travelers and to lay off each of the alleged discriminatees. ….The judge also found that Respondent Employer's foremen's statements that the travelers could not be assigned overtime work and would be laid off before the project's shutdown phase because they were not members of Respondent Union constituted an "outright confession of unlawful discrimination," as did their testimony that such was the Employer's practice. The judge found further evidence of illegal motivation in the foremen's statements that their discrimination against the travelers was due to pressure from Respondent Union, and in Respondent Employer's deviations from its usual policy of having the crew foremen select the persons for layoff and overtime work. (Footnote omitted.)

The Board applied the shifting burdens of proof analysis as required under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), in reversing the judge in finding the employer violated the Act with respect to the additional 42 travelers stating the judge had improperly shifted the respondent employer's burden to the General Counsel.

In *M. W. Kellogg Constructors,* supra at 1051, with respect to the respondent union the Board stated, "To establish a violation of Section 8(b)(2) of the Act, direct evidence that the Union expressly demanded the discrimination is not necessary. A union can be found to have caused employer discrimination if there is sufficient evidence to support a reasonable inference of a union request or a union-employer understanding." (Footnotes omitted.). In reversing the judge, and concluding in *M. W. Kellogg Constructors,* supra, that the respondent union had violated Section 8(b)(2) of the Act, the Board stated, that some of the factors were that foremen on the project informed crewmembers that travelers would not work overtime and were being laid off because of the respondent union's policy. The Board also stated at 1051-1052 that:

> Union Steward Wareham was responsible for "checking in" the new hires on the project and explaining project work rules to them. During check-in, Wareham informed the employees that they would not be assigned unscheduled overtime because Respondent Union's members would do this work. Wareham also told traveler Cangi that he had been assigned overtime because the foreman mistakenly thought Cangi was a

[13] The judge in *Plumbers Local 392*, Id. *at* 793, cited *Sachs Electric Co.,* 248 NLRB 669 (1980), enfd. in relevant part sub nom. *NLRB v. Electrical Workers IBEW Local 453,* 668 F.2d 991 (8th Cir. 1982) in finding the steward's conduct to be violative of the Act.

> member of Respondent Union. When traveler Gilbert Smith complained to Steward Wareham about the layoffs, noting that new Local members were being hired at the same time travelers were being laid off, Wareham replied, "[T]hat's the way it is." When Smith said he did not think it was fair and intended to fight it, Wareham said if Smith fought it he would never work in the area again.
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> * * *
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> We find these circumstances clearly demonstrate the existence of a union-employer understanding that Local members would receive preference over travelers for layoff and unscheduled overtime purposes. Indeed, as noted, Respondent Union and Respondent Employer have admitted its existence. The additional evidence in the form of statements by Respondent Union representatives and Respondent Employer foremen, recited above, is overwhelming confirmation of the parties' understanding. We therefore find that Respondent Union violated Section 8(b)(2)) and (1)(A) of the Act by causing or attempting to cause Respondent Employer to discriminate against travelers in regard to selection for layoff and unscheduled overtime, ….

In *M. W. Kellogg Constructors* at 1052, in finding that the respondent union was responsible for the union steward's remarks at the jobsite the Board stated:

> The General Counsel contends that the judge's reasoning that Wareham was merely acting as Respondent Employer's conduit is without merit. The General Counsel points out that the "work rules" Wareham explained included the terms and conditions embodied in the labor contract. We agree. The union steward was responsible for enforcing the collective-bargaining agreement on the job, and for seeing that those employed on the site had the proper referral slip. Furthermore, Wareham's statement to Cangi was made when Cangi complained to Wareham as steward about his treatment on the job. Thus, Wareham was Respondent Union's representative at the site. See *Iron Workers Local 600 (Bay City Erection)*, 134 NLRB 301, 306-307 (1961), modified on other grounds 144 NLRB 1049 (1963). We find that Wareham's statements tended to restrain or coerce employees in their Section 7 rights, and therefore violated Section 8(b)(1)(A) of the Act.

In *Galick's, Inc.,* 354 NLRB No. 39 (2009), slip op. at 3-4, the Board set forth the following principles to be applied in a *Wright Line,* supra, analysis

> Under *Wright Line,* supra., the General Counsel must first show, by a preponderance of the evidence that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action in the absence of the protect activity. If, however, the evidence establishes that the reasons given for the employer's action are pretextual -- that is, either false or not in fact relied upon-the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. Conduct violative of Section 8(a)(5) may evidence union animus. Unlawful motivation also may be inferred from circumstantial evidence, including timing and pretext. (Footnotes omitted.)
>
> * * *
>
> Contrary to the judge's decision, the evidence does show that the Respondent harbored union animus. When the Union sought voluntary recognition, Galigher responded that he was not interested in being union. A week later, when the Union petitioned for an election in a journeyman unit, Galigher laid off Cottis, his sole remaining

> journeyman. The timing of this layoff is striking. Although the judge did not expressly discredit Galigher's claim that the layoff was due to lack of work, he observed that Paternoster was hired soon after Cottis' layoff and has performed journeyman work. Also indicative of pretext, and evidencing animus, were Galigher's discredited efforts to suggest that his failure to recall journeymen after Cottis' layoff was owing to reduced work. (Footnote omitted.)

2. The current case

The credited evidence reveals that Dinkins, a journeyman electrician, is a dues paying member of Local 776. Dinkins moved to Maryland and he began to using Local 26's hiring hall January 2000 to obtain work. He testified that in order to use local 26's hiring hall he has to register there and present a Local 776 dues receipt. Dinkins obtained Book 1 status, the highest referral status, with Local 26 in 2003.

Local 26 referral records show that Dinkins first and second referrals in 2009 were on May 7 and June 1, to Newtron and he was rejected by Newtron on both occasions. Dinkins testified that since he began using Local 26's hiring hall there has been a decline in the number of job postings from what there was years ago, and that currently there were very few calls for work at the Local. Similarly, long time Local 26 referral agent Laddbush testified referrals were down in June 2009, and there were about 700 to 800 electricians on the out of work list. Prior to the May and June referrals to Newtron, Local 26 records show that Dinkins had last been referred by Local 26 to Freestate on June 9, 2008, and that he was terminated there due to a reduction in force on October 17, 2008.

Dinkins began contacting Titus Foreman Norris in April 2009 requesting employment with Titus. Norris told Dinkins they would need more men soon, and he would place Dinkins first on the list when he needed additional help. Norris, a member of Local 26, had worked with Dinkins on prior jobs.

Dinkins credited testimony reveals that on May 5, Dinkins accepted a referral by Local 26 to Newtron. Dinkins reported to the job on May 7, and Steward Sherman told Dinkins that he had been rejected for employment. Dinkins testified Sherman knew Dinkins from their working together on prior jobs and Sherman knew Dinkins was a traveler, that is not a member of Local 26. On May 28, Dinkins had a conversation with Local 26 Referral Agent Laddbush who asked why Dinkins was accepting another referral to Newtron on that date when Dinkins knew they were going to reject him. Dinkins replied that he did not know that. Laddbush stated Dinkins was just going to be standing in the way of another guy getting a job. Dinkins told Laddbush that he could not refuse work because he was receiving unemployment. Laddbush told Referral Agent Hogan they were not going to argue with Dinkins, and to give him the referral.

Dinkins' credited testimony reveals that on May 28, Dinkins received a phone call from Titus President Miller. Miller told Dinkins that Norris had recommended Dinkins for hire with Titus, stating Norris had stated Dinkins was a good man who was looking for a job. Miller asked if Dinkins wanted to work for his company, and Dinkins said yes. Miller said he would put in a referral request for Dinkins at the union hall, that he wanted Dinkins to start Monday, June 1. Dinkins told Miller that he had received a job referral for June 1, from the hall for Newtron, but he did not know if he would get the job because he had been denied employment there on a prior occasion. Miller told Dinkins to wait until June 1, see what happens, and to give him a call if Dinkins did not get the job.

Dinkins reported to Newtron on June 1. Dinkins asked Sherman if Newtron was going to take him this time. Sherman said no, they had denied Dinkins again. Dinkins asked Sherman for an explanation, and Sherman said he did not know the reason. Dinkins told Sherman that Sherman knew Dinkins was a traveler. Dinkins said he tried to get in Local 26 several times but they would not accept him. Sherman said Local 26 was not going to accept him as a member as they do not accept anyone. Dinkins called Miller on June 1, and told Miller that Dinkins was denied employment at Newtron. Miller said he would put in a call for Dinkins at the union hall. The fax request for Dinkins to the hall from Titus shows it was made, as per the time stamp of Titus fax machine on June 1, at 2:58 p.m. It requested Dinkins for referral by name, with an approximate duration for the work listed on the request as 6 months.

Dinkins went to the Local 26 hall, between 7:30 and 8:30 a.m. on June 2, to obtain the referral slip to Titus. Local 26 referral agents Laddbush and Hogan were behind the referral window. Dinkins told Laddbush that he came to pick up a referral from Titus. Dinkins did not have his Local 776 dues receipt for June with him, a requirement for him to be referred. However, he had requested Local 776 to email the receipt to Laddbush. Dinkins told Laddbush Local 776 had emailed it to Laddbush, but Laddbush denied its receipt. Dinkins called Local 776 and asked them to email it to Local 26 again, but Laddbush continued to deny its receipt. Dinkins testified this went on for a couple of hours. As a result, Dinkins called Local 776 and had them email the receipt to Dinkins' home computer, and he had his wife fax the receipt into Local 26. Dinkins testified he went to lunch around noon because the Local 26 officials kept telling him they did not have the receipt. Dinkins returned around 1 p.m. and Hogan told Dinkins that Hogan had the dues receipt. Upon receipt of the Local 26 referral, Dinkins headed to Titus' shop and arrived around 2 p.m. where he filled out his employee paper work for Titus. Miller called Dinkins later that day and told him could not start work until June 4, because of the late receipt of Dinkins' paperwork and the required security processing. Local 26's referral slip to Titus for Dinkins is dated June 2, with a June 2 start date. It stated Dinkins was a member of Local 776. However, Titus recorded on its payroll records Dinkins was a member of Local 26.

Dinkins' testimony reveals he reported to Norris at the NCE job on June 4. Dinkins testified that on June 4, he worked for Titus pulling wire and installing high bay temporary lights inside one of the tower buildings on the eighth floor. Dinkins left work around 2:30 p.m. which was the time they knocked off from work. Dinkins received an 11 minute call from Norris at 2:42 p.m. on June 4. Dinkins' credited testimony reveals that: During the call, Norris told Dinkins that Norris did not know Dinkins was not a Local 26 member, and Dinkins said he was not a member. Norris stated Dinkins had to understand there were a lot of men from Local 26 looking for work. Norris stated the hall is calling Norris asking why Norris hired Dinkins, knowing that Dinkins was not a member of Local 26. Norris stated there were a lot of people coming down on him, and that it was also personnel in that Norris did not believe in giving someone a job from another local when he had guys on the book. Dinkins protested that he was Book 1, that he went through Local 26's hiring hall, and that it did not make sense that the hall was calling Norris since they gave Dinkins the referral. Norris responded he did not know anything about it, and that he just could not have Dinkins working, and that something had to be done about it. Dinkins responded that he was eligible for the job, the hall sent him, and that Norris referred him to the job. Norris stated, "Do you understand?" that there were a lot of people, and there was pressure on Norris right now and that "people ain't with it." Dinkins again protested and Norris ended the call by stating he had a headache and they would talk about it tomorrow. I find that through his remarks, Norris violated Section 8(a)(1) of the Act by informing Dinkins that Norris could not have Dinkins working because Dinkins was not a member of Local 26. See, *M. W. Kellogg Constructors,* supra. at 1053.

Dinkins called Norris several times on the evening of June 4, but Norris refused to take the calls. Dinkins received a call from Norris on June 5, at around 5 a.m., and Norris told Dinkins to meet Norris in the parking lot. Dinkins met Norris in the parking lot at around 5:20 a.m., and Norris gave Dinkins a termination slip. Norris told Dinkins that he had to understand that Dinkins knew how it is, and what was going on. Dinkins told Norris that it was unfair, that Dinkins was Book 1, that he deserved and needed the job, and that he was going to take it to the Labor Department. Dinkins termination slip was signed by Miller stating there was a reduction in force, and that Dinkins was eligible for rehire. Dinkins called Miller the day of Dinkins' termination and thereafter and Miller refused to take or respond to Dinkins' calls.

Following a non-Board settlement between Dinkins, Local 26, and Newtron, dated August 24, Dinkins began working for Newtron on September 2. It was Shop Steward Sherman's responsibility to escort Dinkins to the badging office shortly after Dinkins reported to work. Sherman informed Dinkins of two warnings he was to receive concerning his attendance. In response to Dinkins' query, Sherman told Dinkins the warnings would not be removed from Dinkins record over time. Sherman then proceeded to tell Dinkins that, as a traveler, if there was a layoff Dinkins would be the first one to be let go.

3. Titus violated Section 8(a)(1) and (3) of the Act by its June 5 termination of Dinkins' employment

I find the General Counsel has established a prima facie case under *Wright Line* that Dinkins June 5 layoff by Titus was motivated by Dinkins' non-membership in Local 26. The evidence reveals that Norris had worked with Dinkins before and had recommended his hire to Miller based on Dinkins' past performance as an electrician. Miller contacted Dinkins on May 28, based on that recommendation, and asked him to work for Titus beginning on Monday June 1. Dinkins could not accept the offer at that time, telling Miller he had received a referral to Newtron to report on June 1, but that he might be rejected by that employer. Miller asked Dinkins to let him know if he did not obtain employment with Newtron, which Dinkins did on June 1. That same day, Miller placed a referral request for Dinkins with Local 26, stating he was seeking Dinkins services for a six month period. Dinkins began working for Titus on June 4, reporting to Norris, at which time Dinkins was assigned to work on one of Truland's office towers along with Titus' other electricians. Neither, Norris nor Miller reported any problem with Dinkins' performance. Nevertheless, shortly after Dinkins left work on June 4, Norris called him and told Dinkins that Norris did not know Dinkins was not a member of Local 26. Norris told Dinkins that he had received a call from the union hall asking Norris why he had hired Dinkins since Dinkins was not a member, and he told Dinkins there were a lot of people coming down on Norris and it was personnel because Norris, a member of Local 26, could not have Dinkins working there when so many members of Local 26 were looking for work. Norris told Dinkins there was pressure on Norris and "people ain't with it." On June 5, Dinkins was laid off prior to beginning work that day. At that time, Norris told Dinkins that he had to understand that Dinkins knew how it is, and what was going on. Thus, there is evidence of timing, knowledge, and animus on the part of Titus towards Dinkins non-membership in Local 26. More than that there is a direct statement by Titus official Norris that he could not have Dinkins working there because of his non-membership status in Local 26.

Thus, the burden shifts to Titus to demonstrate that Dinkins, regardless of his non-membership status in Local 26, would have been laid off for legitimate business reasons. For the following reasons, I find that Titus has failed to meet this burden. In fact, I find the reasons advanced by Titus for Dinkins' layoff to be pretextual. The evidence reveals that Miller wanted Dinkins to start work on Monday, June 1, purportedly to work on bringing power to the trailer of another subcontractor Enclosure. Miller and Norris testified that Titus did not find out until the

afternoon of Thursday, June 4, that they did not get the work for Enclosure. Therefore, had Dinkins met Miller's initial start date of June 1, he would have been working for 4 days before Miller knew whether he was going to get the Enclosure account. Moreover, Miller admitted it was unusual for him to hire someone before he actually secured the work which he was hiring them for. Thus, Miller, under Respondent Titus' scenario, went against Titus' past practice in hiring Dinkins at the time he hired him. Miller's testimony as to his contacts with Enclosure personnel is flimsy at best. He could show no written correspondence, and he could not even recall the name of the person he spoke to.[14] Miller testified that, in essence he lost the account to Enclosure because based on Norris' recommendation, he thought the work for Enclosure would take at least a month using two or three journeymen electricians, and he gave Enclosure a job bid based on those calculations which was more than Enclosure was willing to pay. However, Norris testified he estimated the work for Enclosure would take only a week using one journeyman and one apprentice. This inconsistent testimony renders the claim that Dinkins was hired solely to perform work for Enclosure to be completely implausible. Moreover, Miller had placed on the manpower request to Local 26, that he would need Dinkins for around 6 months. Miller's testimony vacillated here, at first claiming that he did not pay attention to the amount of time Titus placed on the Local 26 manpower order forms. However, it was shown that Titus had at times requested employees for as low as 2 and 3 weeks and that the length of the request time varied on Titus' manpower requests. In fact, Miller later testified that, despite his prior contention that he did not pay attention to the length of time on Titus' manpower requests, that the time period requested for Dinkins of 6 months was accurate based on his belief that he would secure future subcontractor work. Again Miller's hiring Dinkins based upon future unsecured work went against Miller's admitted past practice.

There are additional factors leading me to the conclude Titus' defense was pretextual. First, Dinkins was laid off on the morning of June 5, prior to the start of work. He was notified by Norris that Norris could not have Dinkins working there because Dinkins was not a member of Local 26 during a call Norris placed to Dinkins at 2:42 p.m. on June 4. During the phone call on June 4, Dinkins strongly protested Norris statement that Dinkins was going to be laid off because he was not a member of Local 26. Norris testified he, at Miller's request, traveled from the Springfield, Virginia jobsite to meet with Miller at Titus' Washington, D.C. location at around 5 p.m. on June 4 to discuss Dinkins. Yet, Norris incredibly claimed he did not discuss Dinkins reaction to his going to be laid off with Miller. Contrary to Norris' assertion, I have concluded that he did discuss Dinkins reaction with Miller resulting in Miller's refusing to take Dinkins' calls on June 5 and thereafter. I have also concluded that both Miller and Norris were aware that the reason Dinkins was being laid off was that he was not a member of Local 26, as Norris had informed Dinkins on June 4. The timing of Titus turnaround in actively seeking Dinkins to work there for an estimated 6 months and then terminating him after only 1 day of work suggests that the change in attitude was at the bidding of outside pressure from Local 26, as Norris told Dinkins on June 4. Thus, I have discredited Miller and Norris' testimony that they were not pressured by Local 26 to terminate Dinkins.

Moreover, while Miller had placed a request for an apprentice on March 9, his request went unanswered until June 5, the day Dinkins was let go. Local 26 has gone through great pains to show that the apprentice referral was made by the JATC, and not Local 26. On the other hand, JATC was Local 26's apprentice and training committee and was located in the

[14] Titus argues in its post-hearing brief that it was incumbent upon the General Counsel to subpoena someone from Enclosure to testify to disprove Titus defense and that an adverse inference should be drawn because of the General Counsel's failure to do so. To the contrary, I have found the General Counsel has established a prima facie case, and it was incumbent on Titus to establish a legitimate business defense which it has failed to do.

same building as Local 26's hiring hall. The timing of the apprentice referral, when Titus' request for an apprentice had been months old, being the same day as Dinkins' layoff suggests that the referral was made to help Titus with its manpower needs to compensate for Dinkins lay off at the behest of Local 26. This conclusion is supported by the fact that Sprester was a third year apprentice, and by Norris' testimony that she was performing work of a similar nature to that performed by Dinkins during the one day he worked for Titus. Titus also hired two journeyman electricians for the NCE site shortly after Dinkins was terminated. In this regard, Pegues and Pye were hired on June 29 and July 10, respectively. While Miller testified it was not uncommon for him to bring back employees who had been laid off, he claimed it never occurred to him to do that with Dinkins stating out of site out of mind. Here again, I find Miller's testimony incredible. Miller had summoned Norris to the shop after work to discuss Dinkins' termination on June 4. Earlier in the day, Norris had told Dinkins he was going to be laid off because he was not a member of Local 26, and Dinkins had strongly protested the matter to Norris. On June 5, at the time of his termination, in his discussion with Norris, Dinkins threatened to take the matter to the Labor Department. In fact, Dinkins filed an unfair labor practice charge against Titus on June 26, which was served on Miller by mail on June 29. Thus, Dinkins was neither out of site or out of mind to Miller at the time he hired Peques and in particular Pie. Yet, while both Norris and Miller admitted there was no problem with Dinkins work, Miller failed to recall him. Finally, in a pre-hearing position statement Titus counsel made his opening argument by stating Norris was aware that Dinkins was not a member of Local 26 at the time Titus hired him. This argument was clearly made in support of Titus contention that it was not motivated by Dinkins non-membership in Local 26, when Dinkins was let go after only working 1 day. Yet, at the hearing, Norris testified he did not know Dinkins was not a member of Local 26 at the time Dinkins was hired. Shortly, thereafter Titus' counsel disavowed the statement in his position statement. Such shifting of positions is an indicia of pretext. For all of the forgoing reasons, I find Titus defense was pretextual, and that Titus laid off Dinkins on June 5, because Dinkins was not a member of Local 26, in other words because Dinkins was a traveler, and Titus violated Section 8(a)(1) and (3) of the Act by laying him off.

4. Local 26 violated Section 8(b)(1)(A) and (2) by its role in Dinkins' June 5 termination from Titus

a. Consideration of pre-settlement conduct is warranted pertaining to Local 26

Respondent Local 26 filed a pre-hearing motion "In Limine" arguing certain alleged pre-settlement conduct pertaining to a withdrawn unfair labor practice charge filed against Local 26 by Dinkins relating to Newtron should not be admissible in the current proceeding. The Union argued the non-Board settlement should serve as a bar to the admissibility of the evidence. Counsel for Local 26 proffered on the record that a non-Board settlement agreement between Dinkins, Local 26, and Newtron was entered into on August 24, 2009, resulting in the Regional Director's approval of the withdrawal of certain unfair labor practice charges against Newtron and Local 26. I denied Local 26's prehearing motion in an order dated January 20, 2010 citing precedent as follows:

> In *Northern California District Council, Etc,* 154 NLRB 1384 fn. 1 (1965), the Board found a party may use evidence "of pre-settlement conduct as background evidence establishing the motive or object of a Respondent in its post-settlement activities [.]" In that case, the Regional Director sought to set aside an informal settlement agreement, and pre and post settlement conduct was found to be violative of the Act. In *Local Union 613, Electrical Workers,* 227 NLRB 1954 fn. 1 (1977), the Board concluded it was proper to permit into evidence pre-settlement conduct as background

evidence to establish motive or object of a respondent's post-settlement activities even where a settlement agreement has not been set aside. The Board cited *Steves Sash & Door Co.,* 164 NLRB 468, 476 (1967), enfd. in pertinent part 401 F.2d 676, 678 (5th Cir. 1968). See also, *Host International,* 290 NLRB 440 (1988), where the Board stated, "Even though we are not setting aside the settlement agreement in the earlier case, we agree with the judge that the Respondent's pre-settlement conduct may properly be considered as background evidence to establish the motive for the Respondent's post-settlement conduct in this case."

In *Auto Bus, Inc.,* 293 NLRB 855 (1989), the Board found that in the absence of the Regional Director signing or approving a non-Board settlement, although the Regional Director approves the withdrawal of an unfair labor practice charge does not estop the Director from proceeding on new charges alleging the same conduct of the withdrawn charges. Similarly, in *Monongahela Power Co.,* 324 NLRB 214 (1997), the Board held that non-Board settlement agreements did not preclude consideration of statements made in 1991 and 1993 as background evidence to shed light on a respondent's motivation for its discipline of two employees in 1995. In *BJ's Wholesale Club,* 319 NLRB 483 (1995), in a combined objections and unfair labor practice case where an unfair labor practice charge was settled by an informal settlement, the Board held the scope of the inquiry of the circumstances of the objection was not limited by the settlement of the complaint allegations and the judge was free to consider the impact on the election of evidence concerning the union's alleged unlawful actions as well as any threats relating to such actions. It was specifically noted this was to enable comments, conversations, and events to be placed in context and their impact on employees to be better understood. See also *Kaumagraph Corp.*, 316 NLRB 793 (1995), where pre-settlement threats were considered as background evidence of motive. In *Septix Waste, Inc.,* 346 NLRB 494, 496 (2006), the Board majority found the prosecution of certain pre-stipulation conduct as Section 8(a)(1) allegations was waived by the charging party union by the terms of the stipulation it had entered into with the respondent employer. Nevertheless, the Board found it was appropriate to consider statements covered by the pre-stipulation 8(a)(1) as background evidence of animus to shed light on post-stipulation conduct.

I gave Local 26 leave to renew their argument in their post-hearing brief. Local 26's argument in its brief has apparently changed at this stage of the proceeding. It now contends at page 26 of its brief that "The General Counsel's 'Background Evidence from other cases must be excluded because the General Counsel has failed to prove a prima facie case against the union in the present matter." Local 26 goes on to state at page 27 of its brief that:

> Local 26 recognizes that Board precedent allows the General Counsel to introduce evidence of conduct occurring either before or after the events giving rise to a current charge. However, this evidence is only allowed 'so long as the General Counsel does not rely solely on the evidence proffered as background evidence.' (Citation omitted.) In other words, the General Counsel may supplement evidence supporting the elements of her prima facie case with background evidence from other charges, as long as those charges occurred relatively close in time.

Local 26 argues that evidence of conduct which has been the subject of a settlement agreement is admissible to shed light as background evidence is meaningless in the absence of proof of any violative conduct postdating the settlement. Local 26 argues that the General Counsel here impermissibly sought to use evidence relating to Local 26's referrals of Dinkins to Newtron and Newtron's rejection of those referrals not as background evidence but as evidence to establish her prima facie case against Local 26 pertaining to Titus.

I do not find Local 26's contentions persuasive. The cases set forth above clearly state that the General Counsel may use pre-settlement conduct as evidence of motive, animus and/or to shed light on the facts leading to other unfair labor practice charges. Here, Dinkins charge against Titus and Local 26, pertained to conduct taking place relating to Dinkins termination by Titus on June 5, 2009. Local 26 and Newtron did not reach a non-Board settlement with Dinkins with respect to Local 26's conduct concerning Newtron until August 24, 2009, relating to events taking place in May and on June 1, 2009, in which some of the same Union officials acted as the referring agents to Newtron as they did in referring Dinkins to Titus. There was no settlement agreement between Dinkins, Local 26, and Titus, and of course the actions and comments of the same union officials pertaining to Newtron, occurring in the same time frame, under the above precedent can serve as evidence to color and provide background with respect to Local 26's conduct towards Dinkins with respect to Titus.

Local 26 seeks to pick and choose how the General Counsel can argue its case by throwing up legal constructs in an effort to obfuscate the facts, which are otherwise straight forward. Moreover, in circumstances involving Section 8(b)(2) allegations of unlawful conduct on the part of a union can be established by inference. I find, in the circumstances here, that Dinkins contact with Local 26 pertaining to referrals to Newtron appropriately serves as a backdrop to demonstrate evidence of the Local 26's attitude towards referring him as a traveler during a time of high unemployment. Yet, contrary to the claims of Local 26, there are other more significant factors leading to my conclusion that Local 26 has violated the Act here pertaining to Titus. I do not find Local 26's citation in its post-hearing brief of *Kaumograph Corp.,* 316 NLRB 793, 794 (1995), to be persuasive. There, the judge stated in passing that it is well established that the Board may use presettlement conduct "as background evidence in appraising a Respondent's motivation for its conduct alleged unlawful before me, so long as the General Counsel's case does not rely solely on the evidence proffered as background evidence." In the instant case, the gravamen of the General Counsel's claim is based on an assertion that Local 26 unlawfully caused Titus to terminate Dinkins because he was a traveler. The General Counsel did not rely solely on Local 26's conduct with respect to Newtron to prove that allegation. Moreover, there is no statement in either *Kaumograph Corp,* or in *Local Union 613, Electrical Workers,* 227 NLRB 1954 (1977) also cited by Local 26, that the General Counsel cannot rely on pre-settlement conduct as background evidence in support of its prima facie case pertaining to another charge. In fact, in *Local Union 613, Electrical Workers,* supra at 1954 fn 1, the Board stated the "Administrative law Judge properly permitted the introduction of presettlement conduct as background evidence to establish motive or object of Respondent in its postsettlement activities." Of course motive is often an element of the General Counsel's prima facie case in unfair labor practice proceedings.

Finally, Local 26 was aware of the outstanding charges filed by Dinkins in June 2009 against Local 26 and Titus. Notwithstanding those charges, Local 26 entered into a non-Board settlement with Dinkins and Newtron on August 24, 2009. There is no claim by Local 26 that it obtained any assurances that the General Counsel would not use related pre-settlement conduct in the prosecution of the remaining charges at the time Local 26 entered the August 24, settlement. Under the applicable precedent, and in the circumstances here, I find the General Counsel's reliance of Local 26's conduct pertaining to Newtron to be appropriately considered here as background evidence to it actions with respect to Dinkins and Titus occurring in the same time period. This is particularly so with respect to Local 26 Steward Sherman's remarks to Dinkins on September 2, which post-date the August 24 non-Board settlement.

b. Union Steward Sherman is an agent of Local 26

Local 26's collective-bargaining agreement with the Washington, D.C. Chapter National Electrical Contractors Association, effective June 1, 2009, and its predecessor agreement each contain a "STEWARDS CLAUSE" at section 2.22. The clause provides, in pertinent part, that Local 26 has a right to appoint stewards at any shop or job where workers are employed under the terms of the agreement, with the employer being notified and furnished the name of the steward. The provision states, "The Stewards shall be allowed reasonable time during the regular working hours without loss of pay to see that the terms and conditions of this Agreement are observed at any such shop or job." The provision states that "nor shall any Steward be removed from the job until notice has been given to the Business Manager of the Union." Local 26 bylaws provides at Article IX, that stewards shall be appointed where needed by the business manager and that they shall work under the direction of the business manager and be subject to his or her authority. The Bylaws provide that the business manager may remove a steward at any time. Local 26 bylaws provide that a steward shall have a copy of the IBEW constitution, Local 26 bylaws and the working agreement with them at all times. The bylaws state the steward is to see that union membership is encouraged at their shop or jobs, and that the workers there have paid up dues receipts or valid working cards of the Local Union. The bylaws provide the steward is to report any encroachment of the jurisdiction of the Local Union, and to report to the business manager any violation of the bylaws or agreements. The bylaws provide that the steward is to perform such other duties as may be assigned to them by the business manager. It is stated the stewards are not to cause a work stoppage and they are to immediately report any trouble at the shop or on the job to the business manager.

Laddbush testified the steward is appointed by and is a representative of the Local 26 business manager on the job. He testified the duties include making sure the contract is in compliance. If the contract is not in compliance the steward is supposed to contact the business manager. Laddbush testified stewards are responsible for checking dues receipts of all the employees on the job. Dues are due paid on a quarterly basis. The stewards report the dues information to Local 26. If someone has not paid their dues the stewards encourage them to do so. Laddbush testified the shop steward is supposed to report any encroachment upon the jurisdiction of the local union such as another trade doing their work to the business manager. He testified the shop stewards are trained, the frequency of which is up to the business manager.

In the current case, Dinkins accepted a referral at the Local 26 hall to Newtron on May 5. Dinkins reported to the Newtron jobsite on May 7, at which time Steward Sherman told Dinkins he had been rejected for employment by Newtron. On May 28, Dinkins received another referral from Local 26 to Newtron. At that time, Laddbush, an admitted agent of Local 26, tried to talk Dinkins out of accepting the referral. Nevertheless, Dinkins persisted in accepting the referral and he reported to Newtron on June 1 at 7 a.m. Dinkins asked Sherman if Newtron was going to take him this time. Sherman said no, they had denied Dinkins again. Dinkins asked Sherman for an explanation, and Sherman said he did not know the reason. Dinkins told Sherman that Sherman knew Dinkins was a traveler. Dinkins said he tried to get in Local 26 several times but they would not accept him. Sherman said they were not going to accept him as a member of Local 26. Sherman said they do not accept anyone.

On the morning of June 2, Dinkins reported to the Local 26 referral hall to receive a referral for employment with Titus. Union officials Laddbush and Hogan were at the hall and claimed they did not receive Dinkins' dues receipt from Local 776, delaying Dinkins referral to Titus for several hours, until Dinkins finally had the Local 776 dues receipt emailed to his home computer, and his wife faxed it to the union hall. This action by Local 26 does not appear to be

isolated, and I infer it was part of a pattern of conduct of giving Dinkins a hard time in accepting referrals from the Local.[15] Dinkins reported to Titus for work on June 4, and worked a full day along with the other Titus electricians without incident. Shortly after the work day was over, Dinkins received a call from Titus Foreman Norris, in which Norris stated he had received a complaint from the union hall about working Dinkins because Dinkins was not a member of Local 26. Norris stated he was under a lot of pressure, and that he, as a member of Local 26, also personally objected to working Dinkins when Local 26 members were out of work. Dinkins was terminated by Titus the next morning.

On August 24, Dinkins, Local 26, and Newtron entered into a non-Board settlement concerning unfair labor practice charges Dinkins had filed against the latter two. Dinkins began employment with Newtron on September 2. When he reported to work, Sherman informed Dinkins that he would receive two written disciplines relating to his attendance, and Sherman in fact handed Dinkins the discipline. Sherman told Dinkins the disciplines could not be removed from his record. Sherman also told Dinkins that, as a traveler, Dinkins would be the first to be laid off. Dinkins was eventually discharged by Newtron and Sherman attended the discharge meeting. Sherman also escorted terminated employees off of the site.

In sum, Sherman was appointed by the Union business manager and served at his pleasure. It was his responsibility on behalf of the business manager to ensure that the collective-bargaining agreement was followed at the site. Sherman, as steward, was also required to have with him copy of the IBEW constitution, Local 26 bylaws and the working agreement at all times indicating it was his responsibility to advise the employees of their contractual rights and of Local 26's rules, regulations, and procedures. Sherman aided Local 26 in the collection of dues and it was his responsibility to encourage employees to attend union meetings. Sherman's responsibilities were also intimately related to the operation of Local 26's referral agreement as he had twice informed Dinkins that Newtron had rejected Dinkins employment, he attended Dinkins termination meeting and was the only steward present there, and he escorted terminated employees from the site. Sherman's statements and actions were in line with the conduct of Referral Agent Laddbush who tried to convince Dinkins not to accept a referral to Newtron, and who then delayed in giving Dinkins a subsequent referral to Titus. I find Sherman had actual and apparent authority to act as an agent of Local 26 at the Newtron site, and that from the circumstances here that it was reasonable for Dinkins to assume he was acting in that capacity. See, *M. W. Kellogg Constructors*, 273 NLRB 1049, 1051-1052 (1984); *Avon Roofing,* 312 NLRB 499 (1993); and *Plumbers Local 392 (Oberle-Jorde Co.),* 273 NLRB 786, 793 (1984). See also *Tyson Fresh Meats, Inc.,* 343 NLRB 1335, 1337 (2004), where a steward was found to be an agent of a union stating "the Board has placed probative value on an alleged agent's position as steward, finding that a steward is 'the first union representative the members look to, and the man from whom they take their cues insofar as union policy is concerned.'" In *Tyson Fresh Meats, Inc.,* in finding that stewards served as agents for a union in an election campaign, the Board also stated at 1337:

> That there is no affirmative evidence that the Union specifically authorized the stewards to participate in the election campaign does not warrant a contrary result. "It is enough if the principal actually empowered the agent to represent him in the general area within

[15] I have considered and rejected the explanations of Local 26 pertaining to Dinkins reported encounters with Local 26 officials at the union hall on May 28 and June 2. Considering the record as a whole, I do not view them as isolated or mere happenstance, but consider them to be part of a pattern of conduct towards him by Local 26 due to Dinkins' traveler status at a time when many of Local 26's members were seeking employment.

> which the agent acted. Accordingly, we find that the stewards had actual authority to represent the Union when they spoke to voters in the voting line. (Citations omitted).

I find that Local 26 empowered Sherman to represent it in the general area in which Sherman acted. I also find that Sherman's September 2, statement to Dinkins that Dinkins would be laid off first because he was a traveler revealed animus on the part of Local 26 officials against Dinkins due to his traveler status, although the statement was not specifically alleged in the complaint as independently violative of Section 8(b)(1)(A) of the Act. See, *Plumbers Local 392 (Oberle-Jorde Co.), supra.*

c. Local 26 engaged in conduct violative of 8(b)(1)(A) and (2) of the Act.

A labor organization violates Section 8(b)(1)(A) and (2) of the Act by causing or attempting to cause an employer to discriminate against an employee in violation of Section 8(a)(1) and (3) of the Act. To establish a violation of the Act, direct evidence that a union requested an employer to discriminate is not necessary. A violation can be found on the part of a union if there is sufficient evidence to support a reasonable inference of a union request or a union employer understanding. See, *Kellog Constructors,* 273 NLRB 1049, 1051 (1984), remanded on other grounds 806 F.2d 1435 (9th Cir. 1986); and *Avon Roofing,* 312 NLRB 499 (1993). In the absence of direct evidence, an unlawful act is established through inference from the record as a whole. *Continental Can Co.,* 291 NLRB 290, 291 fn. 5 (1988).

In *Kellog Constructors,* supra, the Board, in assessing the 8(b)(2) allegation held that the respondent employer and union both admitted the existence of a discriminatory practice to which they were a party noting statements by the union business manager and steward of granting preference to local members over travelers for overtime and layoff purposes within the local. It was noted that the steward testified that if the travelers had not been laid off first, he would have considered it a violation of the members' rights and that he would have had to "try to help the members out." The Board stated that foremen on the project informed their crewmembers that the travelers would not work overtime and were being laid off because of Respondent Union's policy. Similarly, in *Groves-Granite,* 229 NLRB 56, 63-67 (1977), it was stated that while the evidence was heavily circumstantial, it warranted a finding that union official Peaslee and employer representative Wells had worked out a deal that employee Baublitz be transferred and that as a direct outgrowth of this, employer representative Vestal prevailed on Wells to discharge Baublitz, and thus the union violated Section 8(b)(1)(A) and (2) of the Act, and the employer discharged the employee in violation of Section 8(a)(1) and (3) in collaboration with the union. It was stated on the threshold issue of union causation it was noted that Baublitz had filed internal union charges against Peaslee just a week before the discharge. It was stated that although there was no explicit evidence that Peaslee's irritation over the filing of an internal union charge a week before the discharge translated in an attempt to affect Baublitz' job status, there was ample basis to infer that the discharge was precipitated by some kind of understanding between Peaslee and Wells on the general subject, their denials notwithstanding. One indication, was Peaslee's reaction when he found out about the discharge by stating that they fouled him up that they said they would transfer him. Another factor considered was the spurious nature of the reasons advanced by the employer for the discharge.

In *NLRB v Local 776, IATSE (Film Editors),* 303 F.2d 513, 516 (9th Cir. 1962), cert. denied 371 U.S. 826 (1962), concerning an 8(b)(1)(A) and (2) allegation, the court stated:

> The trial examiner acknowledged in his Intermediate Report that there was no direct proof of respondent (union's) complicity in the dismissal; however, he was of the opinion that the record manifested an 'implicit' demand by respondent (union) upon Cascade to

> discharge Carlson. Respondent readily recognizes the power of the Board to draw reasonable inferences and make other pertinent deductions from the evidence (*Radio Officers' Union of, etc., v. N.L.R.B.,* 347 U.S. 17, 48-52, 74 S.Ct. 323 (1954)), but argues with much vigor that here this foundation is completely absent so that the finding is not 'supported by substantial evidence on the record considered as a whole * * *' within the meaning of sections 10(e) and (f) of the Act. Id. 516-517.

In sustaining the Board's finding of a violation against the union the court stated "the Board's factual conclusion is neither unreasonable nor too tenuous to stand. In *NLRB v Local 776, IATSE (Film Editors),* supra, Cascade, Carlson's employer, questioned the respondent union as to whether Carlson's job was covered by the employer's collective-bargaining agreement with the union. Union official Todd discussed the matter with one of Cascade's officials, who a few days later notified employer official Loftus that the job came under the union's jurisdiction. Carlson testified Loftus told him that the union was on his back, and he was forced to let Carlson go by the end of the week. The court stated Loftus' statement although admissible evidence concerning the employer pertaining to the 8(a)(3) allegation was hearsay as to the respondent union. However, the court concluded additional statements concerning union agent Todd following the discharge provided a sufficient basis to sustain the unfair labor practice finding. In affirming the 8(b)(1)(A) and 8(b)(2) finding the court noted, that the sequence of events including that Carlson's job was taken by a member of the respondent union's, and Todd's statement's recognizing a moral obligation to find Carlson work are persuasive to the finding that the respondent union played a prominent role in Carlson's termination from Cascade, as well as the finding that an employer is not in the habit of dismissing competent employees to replace them with another.

In *NLRB v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 127,* 202 F.2d 671, 672 -673 (CA 9 1953), one of the issues before the court was whether a union had violated Section 8(b)(2) of the act by causing an employer to discharge employee Wyatt due to his refusal to join the union. The court in reversing the Board concluded the Board's finding that the Union caused Wyatt's discharge is without support in the record and must be rejected. The court stated the only testimony that union representative Weborg requested that employer official Gearhart that Wyatt be discharged was given by Wyatt who testified that during the conversation with Gearhart, when Gearhart stated Wyatt he should not come back to work, Gearhart said Weborg said Gearhart could not use Wyatt anymore because he would not join the union. The court stated, "Aside from this statement, hearsay as against the Union, there was nothing of substance either direct or circumstantial to show Wyatt's discharge was affected at the request of the Union." It was noted there that Wyatt had no prior experience in the work he was performing, and he had been given the understanding that he was given the employment to take the place of another man out due to illness. It was noted that, Gearhart's testimony was uncontradicted that Wyatt was let go because he was replaced by someone with greater seniority, and there was no other work for him. The court concluded there was nothing left but the hearsay testimony set forth above to support the Board's finding that the union caused the discharge. The court stated that Section 10(b) of the Act requires the Board's proceedings to be conducted so far as practicable under the rules of evidence applicable in district courts of the United states. The court stated, "Wholly apart from this provision of Sec. 10(b), in proceedings conforming to the requirements of the Administrative Procedure Act, 5 U.S.C.A. 1001 et seq., agency findings 'cannot be based upon hearsay alone. *Willapoint Oysters v. Ewing,* 9 Cir., 174 F.2d 676, 691." Id. at 673.

In *Willapoint Oysters v. Ewing,* 174 F.2d 676, 690-691(9th. Cir. 1949), cert. denied 339 US 945 (1950), the court stated:

> The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings. Such construction would nullify the first portion of section 7(c), Administrative Procedure Act, providing for the receipt of such evidence.
>
> The degrees of probative force and reliability of hearsay evidence are infinite in variation, and its use by administrative bodies, ex necessitate, must in part be governed by the relative unavailability of other and better evidence. However, since 'substantial evidence' includes more than 'uncorroborated hearsay' and 'more than a mere scintilla,'[FN23] the findings, to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla. Founded upon these requirements, the test whether, in the individual case before the court, there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'[FN24]
>
> An exhaustive search of the entire record convinces us that the portion of the order relating to fill satisfies this test and there was no abusive and thus reversible use of hearsay.[FN25]
>
> Further, even though some of the findings may be questionable, such findings merely lose their conclusive character, i.e., lose any persuasiveness they may have had upon the reviewing court.[FN26] But when, as here, there are sufficient validly supported findings to uphold an administrative order, the court may not upset it. (Footnotes omitted.)

In this regard, the Board has long held hearsay evidence is admissable, "if rationally probative in force and is corroborated by something more then the slightest amount of other evidence." *Dauman Pallet, Inc.* 314 NLRB 185, 186 (994); and *Sheet Metal Workers Local 28 (Astoria Mechanical Corp.)* 323 NLRB 207, 209 fn. 2 (1993). See, also *Passaic Daily News v. NLRB* 736 F.2d 1543, 1554 fn. 15 (D.C. Cir. 1984). In *RJR Communications, Inc.* 248 NLRB 920, 921-922 (1980), the Board stated:

> Courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence. *N.L.R.B.* v. *Imparato Stevedoring Corporation*, 250 F.2d 297 (3d Cir. 1957). The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstance. *Georgetown Associates, d/b/a Georgetown Holiday Inn*, 235 NLRB 485, fn. 1 (1978). See, generally, *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978).
>
> In the instant case we believe that, although the testimony may be hearsay, the statements were admissible. Of course, we do not rely on the statements, standing alone, to find that Respondent's conduct was violative. As stated herein, we find that other evidence clearly establishes that Respondent engaged in unlawful conduct. Moreover, we find that James Rich's statements corroborate the other evidence and make it more probable that Respondent's conduct was unlawful. Accordingly, we find, in agreement with the Administrative Law Judge, that Respondent by discharging certain employees and by eliminating its 6 o'clock newscast violated Section 8(a)(3) and (1) of the Act.

As famously noted in *Shattuck Denn Mining Corp. v. NLRB,* 366 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-

required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

In the instant case, Laddbush, a referral agent for Local 26, acknowledged knowing Dinkins was a traveler. Laddbush also testified that referrals were down by Local 26 during the time period at issue and there were 709 electricians on the out of work list on May 28. On May 5, Dinkins accepted a referral by Local 26 to Newtron. Dinkins reported to the job on May 7, and Steward Sherman told Dinkins that he had been rejected for employment. Dinkins credibly testified Sherman knew Dinkins was not a member of Local 26 from their working together on prior jobs. On May 28, Dinkins was at the union hall and he was eligible to receive another referral to Newtron. At that time, Laddbush asked Dinkins why he was accepting the referral to Newtron when Dinkins knew they were going to reject him. Dinkins replied he did not know that. Laddbush stated Dinkins was just going to be standing in the way of another guy from getting a job. Dinkins persisted and Laddbush told Referral Agent Hogan they were not going to argue with Dinkins, and to give him the referral.

On May 28, Dinkins received a phone call from Titus President Miller. Miller told Dinkins that Titus Foreman Norris had recommended Dinkins for hire with Titus, stating Norris had stated Dinkins was a good man who was looking for a job. Miller asked if Dinkins wanted to work for his company, and Dinkins said yes. Miller said he would put in a referral request for Dinkins at the union hall, that he wanted Dinkins to start that Monday, June 1. Dinkins told Miller that he had a job referral to Newtron requiring him to report on June 1, that he had recently been rejected by Newtron, and that he might get rejected again. Miller told Dinkins to wait until June 1, see what happens, and to give him a call if Dinkins did not get the job.

Dinkins reported to Newtron on June 1. Dinkins asked Sherman if Newtron was going to take him this time. Sherman said no, they had denied Dinkins again. Dinkins asked Sherman for an explanation, and Sherman said he did not know the reason. Dinkins told Sherman that Sherman knew Dinkins was a traveler. Dinkins said he tried to get in Local 26 several times but they would not accept him. Sherman said Local 26, was not going to accept him as a member as they do not accept anyone. Each time Dinkins was rejected by Newtron, the following was written on Local 26's work history card for Dinkins, "REJECTED !." This notation was unlike the prior notations on Dinkins' card in that it was in capital letters with an exclamation point.

After Dinkins left the Newtron site on June 1, he called Miller stating he had been denied employment by Newtron. Miller stated he would put in a call for Dinkins at the union hall that day. The fax request for Dinkins to the hall from Titus shows it was made, as per the time stamp of Titus fax machine on June 1, at 2:58 p.m. It requested Dinkins for referral by name, with an approximate duration for the work listed on the request as 6 months.

Dinkins went to the Local 26 hall, between 7:30 and 8:30 a.m. on June 2, to obtain the referral slip to Titus. Referral agents Laddbush and Hogan were there. Dinkins told Laddbush that he came to pick up a referral from Titus. Dinkins did not have his Local 776 dues receipt for June with him. However, he had requested Local 776 to email the receipt to Laddbush. Dinkins told Laddbush Local 776 had emailed it to Laddbush, but Laddbush denied its receipt. Dinkins called Local 776 and asked them to email it to Local 26 again, but Laddbush continued to deny its receipt. Dinkins testified this went on for a couple of hours. As a result, Dinkins called Local 776 and had them email the receipt to Dinkins' home computer, and he had his wife fax the receipt into Local 26. At around 1 p.m., Hogan told Dinkins that Hogan had the dues receipt. Dinkins received a referral after 1:00 p.m., and he headed to Titus' shop to fill out the necessary

paper work as an employee. Dinkins received a call from Miller later that day. Miller told Dinkins that he was not going to be able to start work on June 3 because they did not receive his paperwork in time for him to go through the security process. Local 26's referral slip to Titus for Dinkins is dated June 2, with a June 2 start date. It showed Dinkins was a member of Local 776. However, Titus recorded on its payroll records for Dinkins that he was a member of Local 26. Miller credibly testified that he assumed everyone referred to him by Local 26 was a member of Local 26, and that Titus' computer automatically inputted that information on an employees payroll records. Similarly, there was no evidence that Titus Forman Norris was shown a copy of the referral slip, and Norris claimed he did not know Dinkins was not a member of Local 26, until Dinkins apprised him of such on June 4.

Dinkins worked for Titus for a full day on June 4. Both Miller and Norris testified Dinkins' work was satisfactory. Dinkins left work that day at the 2:30 p.m. quitting time. Dinkins credited testimony reveals that at 2:42 p.m. as he was driving home on June 4, he received a call from Norris. During the call, Norris told Dinkins that Norris did not know Dinkins was not a Local 26 member, and Dinkins said he was not a member. Norris stated Dinkins had to understand that there were a lot of men from Local 26 looking for work. Norris stated the hall is calling Norris asking why Norris hired Dinkins, knowing that Dinkins was not a member of Local 26. Norris stated there were a lot of people coming down on him, and that it was also personnel in that Norris did not believe in giving someone a job from another local when he had guys on the book. Dinkins protested Norris statements arguing that he was Book 1, and that he went through Local 26's hiring hall. Norris responded he did not know anything about it, and that he just could not have Dinkins working, and that something had to be done about it. Norris terminated Dinkins on the morning of June 5, before the start of work. At that time, Norris told Dinkins that he had to understand that Dinkins knew how it is, and what was going on. Dinkins termination slip was signed by Miller stating there was a reduction in force, and that Dinkins was eligible for rehire. On June 5, the day of Dinkins termination, the JATC housed in the same building as Local 26, referred Sprester, a third year apprentice, to work for Titus at the NCE site. The timing of this referral raises an inference of collusion between Local 26 and Titus because Titus request for an apprentice had been pending with the JATC for three months at the time of Sprester's June 5 referral. Norris' testimony reveals Sprester performed similar work to Dinkins for the one day he was there. It appears that she actually began working for Titus on June 9.

Following a non-Board settlement between Dinkins, Local 26, and Newtron, dated August 24, concerning charges that Dinkins had filed against Local 26 and Newtron, Dinkins began working for Newtron on September 2. It was Shop Steward Sherman's responsibility to escort Dinkins to the badging office shortly after Dinkins reported to work. Sherman informed Dinkins of two warnings he was to receive concerning his attendance, and then proceeded to tell Dinkins that, as a traveler, if there was a layoff Dinkins would be the first one to be let go.

As set forth above, I found the reasons advanced by Titus for Dinkins June 5, layoff to be pretextual, and that his layoff to be motivated by Dinkins non-membership status in Local 26 in violation of Section 8(a)(1) and (3) of the Act. Moreover, the evidence reveals that Norris and Miller sought out Dinkins as an employee of Titus. Norris testified he did not know Dinkins was not a member of Local 26 at the time he was hired, and Miller also testified he did not know. In these circumstances, I have concluded that Norris learned of Dinkins nonmembership status upon receiving a complaint from the union hall as he had informed Dinkins after Dinkins' first day of work. Given the pretextual nature and the timing of the discharge, I have concluded as Norris informed Dinkins that Norris had received a call from the union hall protesting Dinkins employment because Dinkins was not a member of Local 26, and that such call led to Dinkins' June 5 termination. I have discredited the self-serving testimony of Miller, Norris, Laddbush and Hogan that no such call was made. The Board has relied on such statements by supervisors in

the 8(b)(2) context, in part, to establish that a union has violated the Act. See, *M. W. Kellogg Constructors*, 273 NLRB 1049, 1051-1052 (1984); and the Board has relied on hearsay statements in general when the evidence warrants it. *Dauman Pallet, Inc.* 314 NLRB 185, 186 (1994); and *RJR Communications, Inc.* 248 NLRB 920, 921-922 (1980).

I do not find Dinkins' testimony as to Norris' remarks to constitute uncorroborated hearsay as the Union contends. In this regard, Dinkins was referred to Newtron on May 7 by Local 26, and he was told he was rejected for the referral by the job steward Sherman. On May 28, Laddbush tried to dissuade Dinkins from accepting another referral to Newtron. Dinkins was again told he was rejected by Newtron by the job steward. Both rejections were recorded in capital letters with exclamation points in the Local 26's business records indicating the union officials were keeping an eye on Dinkins referrals. On June 2, Dinkins went to the Local 26 hall having been informed by Miller that Titus had faxed in a request for Dinkins services. Dinkins had requested Local 776 to email Laddbush Dinkins' dues receipt so Dinkins could obtain the referral. Yet, Dinkins experienced substantial delay by Laddbush and Hogan in obtaining the referral until he finally had Local 776 email the receipt to Dinkins' wife, and had her fax it in to the facility. Thus, I have concluded that Local 26 officials were giving Dinkins a hard time about accepting referrals out of the hall. Following a settlement agreement dated August 24 between Dinkins, Local 26, and Newtron over charges Dinkins had filed against the latter two, Dinkins was given a referral by Local 26 to Newtron and began working there on September 2. During Dinkins first day of work, Sherman told him that he was going to be the recipient of two disciplinary warnings pertaining to attendance. Dinkins protested the warnings, and when he asked if at some point they could be removed from Dinkins' file, Sherman rather than offering to try and intercede in Dinkins behalf informed Dinkins that the warnings would forever be part of his records at Newtron. Sherman, during the same conversation, told Dinkins that as a traveler Dinkins would be the first to be laid off. I find Sherman's remark concerning Dinkins' layoff status to constitute direct evidence of animus on the part of Local 26 towards Dinkins because of his traveler status. Added to this, on June 5, the day Dinkins was laid off from Titus, the Union's Joint Apprenticeship Training Committee housed in the same two story building as the Local 26 hiring hall referred a third year apprentice to Titus, although Titus' request for an apprentice had been pending since March 9. The timing of the referral is striking and suggests collusion between Local 26 and Titus. It also signifies that Titus had work available at the time it laid off Dinkins. Finally, Norris and Miller had openly sought Dinkins as a employee of Titus with Miller making a six month referral request to Local 26 for his services. Admittedly he performed well, yet he was laid off after his first day of work. The timing of the layoff serves to corroborate Norris' statement to Dinkins that Norris had received pressure from the Union to lay Dinkins off because Dinkins was not a member of Local 26. The Board has found an employee's termination based on pretextual reasons to be an indication that a union was involved in the termination. *Groves-Granite,* 229 NLRB 56, 63-67 (1977). I have concluded the reasons advanced by Titus for Dinkins termination were pretextual.

I have concluded that there is evidence of knowledge, timing, and animus pertaining to Dinkins due to his traveler status on the part of Local 26, and I infer from the record as a whole that Dinkins quick termination from employment from Titus was caused by pressure Titus received from Local 26 as Norris told Dinkins it was. See, *Kellog Constructors,* 273 NLRB 1049, 1051 (1984), remanded on other grounds 806 F.2d 1435 (9th Cir. 1986); *Avon Roofing,* 312 NLRB 499 (1993); *Continental Can Co.,* 291 NLRB 290, 291 fn. 5 (1988); and *NLRB v Local 776, IATSE (Film Editors),* 303 F.2d 513, 516 (9th Cir. 1962). I have not, in the circumstances here, credited Miller, Norris, Laddbush, and Hogan's self serving denials claiming that the Union did not intervene with Titus in seeking Dinkins' termination. See, *Shattuck Denn Mining Corp. v. NLRB,* 366 F.2d 466, 470 (9th Cir. 1966). The record evidence as a whole strongly supports an inference and finding that a call was made by either Laddbush or Hogan to Titus complaining of

Dinkins' hiring. Moreover, failure to reach such a finding here would send a signal that union officials can pressure employers behind closed doors to discriminate against an employee, and not be brought to brook because it is in the interest of the only people who had direct knowledge of the conversation to deny its existence. Accordingly, I find that the record as a whole supports a finding that Local 26 caused Dinkins' June 5 termination from Titus because of Dinkins' non-membership status in Local 26, and that by doing so, Local 26 violated Section 8(b)(1)(A) and (2) of the Act.[16]

CONCLUSIONS OF LAW

1. Titus, LLC (Titus) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local 26 (Local 26) is a labor organization within the meaning of Section 2(5) of the Act.
3. By informing an employee that Titus could not have him working because the employee was not a member of Local 26, Titus violated Section 8(a)(1) of the Act.
4. By terminating employee James Dinkins on June 5, 2009, because he was not a member of Local 26, Titus violated Section 8(a)(1) and (3) of the Act.
5. By causing Titus to terminate James Dinkins on June 5, 2009, because he was not a member of Local 26, Local 26 violated Section 8(b)(1)(A) and (2) of the Act.
6. The forgoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, Respondents must cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. I have found that Titus terminated Dinkins on June 5, 2009, in violation of Section 8(a)(1) and (3) of the Act, and that Local 26 caused that termination in violation of Section 8(b)(1)(A) and (2) of the Act. Consequently, I shall order that the Respondents jointly and severally make Dinkins whole for any loss of earnings and benefits he may have sustained as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[17] Titus backpay obligation shall run from the June 5, 2009, effective date of Dinkins termination until Titus offers Dinkins employment to his former, or if unavailable, a substantially equivalent position. In this regard, Miller testified that there was no date certain for the completion of the NCE project, and that he will on occasion transfer employees to other jobsites when their assigned projects are complete. Local 26's backpay obligation shall run from June 5, 2009, to the date when it notifies Dinkins and Titus in writing that it has no objection to Titus employment of Dinkins. I shall also

[16] I do not view cases cited by Local 26 such as *Brunswick Corporation,* 131 NLRB 1338 (1961); *Brotherhood of Railway Airline & Steamship Clerks,* 180 NLRB 126 (1969); *Ohmite Mfg. Co.,* 290 NLRB 1036 (1988); and *Auto Workers Local 651 (General Motors Corp.),* 331 NLRB 479 (2000), for the proposition that uncorroborated hearsay cannot be relied on as affirmative evidence require a different result than that I have reached here. Each of those cases turned on its own set of facts, and as I have found here, Norris' June 4 remarks to Dinkins as to Local 26's role in his discharge was just one factor in my finding that Local 26 was a fault. Rather, I have concluded that Norris' remarks were corroborated by the record as a whole supporting an inference as to Local 26's role which I have found to be violative of the Act.

[17] The General Counsel asks that I alter traditional Board remedies pertaining to the calculation of interest. I find this is a matter for the Board to decide.

order that the Respondents cease and desist in any like or related manner from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The National Labor Relations Board orders that,

A. The Respondent Employer Titus, LLC, with an office and place of business in Washington, D.C., its officers, agents, successors, and assigns shall

1. Cease and desist from:

(a) Informing employees that Titus could not have them working because they are not a member of Local 26.

(b) Discharging or otherwise discriminating against employees because they are not a member of Local 26, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer James Dinkins his former position, or if that position is no longer available, a substantially equivalent position, displacing, if necessary, any employee occupying that position.

(b) Jointly and severally with Local 26, make James Dinkins whole for any loss of earnings or other benefits, plus interest, suffered as a result of his June 5, 2009, termination.

(c) Within 14 days from the date of this Order, expunge from its records all references to the unlawful termination of James Dinkins, and advise him in writing that this has been done and that the termination will not be used against him in any way.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board, or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Springfield, Virginia NCE jobsite and at its Washington, D.C. office and shop copies of the attached notice marked "Appendix A."[19] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has

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[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in all the notices ordered herein reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

gone out of business, or is no longer providing services at the NCE location, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees, employees on layoff, and former employees who were employed by the Respondent at that location at any time since June 5, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Titus has taken to comply.

B. Respondent International Brotherhood of Electrical Workers, Local 26, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Causing or attempting to cause Respondent Titus to discriminate against employees in violation of Section 8(a)(1) and (3) of the Act.

(b) In any like or related manner restraining or coercing the employees of Titus in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Titus make James Dinkins whole for any loss of earnings or other benefits, plus interest, suffered as a result of Dinkins' June 5, 2009, termination of employment from Titus.

(b) Notify Respondent Titus and James Dinkins in writing that Local 26 has no objection to Titus awarding Dinkins his former position, or if that is not available, a substantially equivalent position, displacing any employee, if necessary, occupying that position.

(c) Post at its offices, hiring halls, and at the Titus shop, office, and NCE Springfield location copies of the attached notices marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 5, shall be posted by Respondent Local 26 after being signed by the Respondents Local 26's authorized representative immediately upon receipt thereof. The notices shall be maintained by Respondent Local 26 for 60 consecutive days after posting in conspicuous places where notices to the above-described members and employees are customarily posted. Reasonable steps shall be taken by Respondent Local 26 to insure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Local 26 has taken to comply.

Dated, Washington, D.C. August 26, 2010

_____
Eric M. Fine
Administrative Law Judge

APPENDIX A
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT Inform employees that we cannot have them working because they are not a member of International Brotherhood of Electrical Workers, Local 26 (Local 26), or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against employees because they are not a member of Local 26, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of the Board's Order, offer James Dinkins his former position, or if that position is no longer available a substantially equivalent position, displacing, if necessary, any employee occupying that position.

WE WILL jointly and severally with Local 26, make James Dinkins whole for any loss of earnings or other benefits, plus interest suffered as a result of his June 5, 2009, termination.

WE WILL within 14 days from the date of the Board's Order, expunge from our records all references to the James Dinkins June 5, 2009, termination, and notify him in writing that this has been done and that his termination shall not be used against him in any manner.

TITUS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.

APPENDIX B
NOTICE TO MEMBERS AND EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT cause or attempt to cause Titus, LLC to discriminate against employees in violation of Section 8(a)(1) and (3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce the employees of Titus, LLC in the exercise of their rights protected by Section 7 of the Act.

WE WILL jointly and severally with Titus, LLC make James Dinkins whole for any loss of earnings or other benefits, plus interest, suffered as a result of Dinkins June 5, 2009, termination of employment from Titus, LLC.

WE WILL, within 14 days of the Board's Order, notify Titus, LLC and James Dinkins in writing that Local 26 has no objection to Titus, LLC awarding Dinkins his former position, or if that is not available, a substantially equivalent position, displacing any employee, if necessary, occupying that position.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 26
(Union)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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